"Govern a great nation as you would cook a small fish. (Don't overdo it.)"—Lao-tse.

the
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A Report to the Reader

Legal Problems of Insurance Agents—Accounting

Reporting to our readers this month is Charles W. Tye, of Joseph Froggatt & Company, Newark, New Jersey.

THE accounting aspects of an insurance agency are all too often ignored or left to chance. A clear understanding of the elections available under the tax law is a "must" if costly tax consequences are to be avoided.

One of the most important elections is the selection of the accounting period. The accounting period may be based on either a calendar or a fiscal year. A fiscal-year basis is any accounting period of 12 months ending on the last day of any month other than December. If you do not keep books, you must use the calendar-year basis. Also, once you have selected an accounting period, you are bound by such election, must keep your books in accordance therewith and may not change the accounting period without obtaining the consent of the Commissioner of Internal Revenue. In order to obtain permission, application must be made on forms provided for this purpose and should be filed at least 60 days before the close of the fractional year for which a return is required to effect the change. Of course, if a voluntary change is made without prior approval, the commissioner may approve by accepting the returns as filed.

The next election is the method of accounting to be employed. Generally, there are two basic methods: the cash and the accrual. You must use the cash basis unless required to use the accrual method to reflect income properly or unless you have elected to use the latter and actually keep your books on the accrual basis. You elect the method you want to use when you file your first tax return. Here, also, the election is binding unless a change is permitted by the commissioner. The advantages and disadvantages of each method depend essentially upon the size of the agency. As a general rule, small agencies can profitably use the cash basis, whereas larger agencies will normally find it essential to use the accrual basis. The advantage of the accrual basis to large agencies is that it tends to level off the income from year to year and also that it more closely co-ordinates expenditures with anticipated earnings.

Consistency of treatment should be the rule regardless of the accounting method adopted, since the commissioner has broad powers to insist that items of income and deductions be reported in the right taxing period. In fact, the regulations emphasize that the method of accounting employed must clearly reflect income. A good indication of what is contemplated in this regard is *Osterloh v. Lucas*, 37 F. (2d) 277, where the court said:

"The case turns largely upon what is meant by the requirement that the method of accounting shall clearly reflect the income. If this requirement is absolute, it is safe to say that books kept on the basis of cash received and disbursed will rarely,

if ever, reflect the true income, because nearly always at the end of a tax year accounts due the taxpayer will remain uncollected and some of his own obligations will remain unpaid. But we do not think that any such literal construction was contemplated. In our opinion, all that is meant is that the books shall be kept fairly and honestly; and when so kept they reflect the true income of the taxpayer within the meaning of the law. In other words, the books are controlling, unless there has been an attempt of some sort to evade the tax. This construction may work to the disadvantage of the taxpayer or the government at times, but if followed out consistently and honestly year after year the result in the end will approximate equality as nearly as we can hope for in the administration of a revenue law."

Consistent with the above, the commissioner may not be inconsistent in any changes he may make in the accounting method employed. Thus, it is not permissible to force the taxpayer to utilize a hybrid cash-and-accrual system whereby receipts, for example, would be on the cash basis and expenditures on the accrual. The one basic exception concerns prepaid items, such as rent or premiums which must be deducted pro rata over the term of the lease or insurance policy, even though the receipts may be fully taxable in the year received.

Another problem concerns what are considered "books" for purposes of determining what accounting method has been employed. In the *Max H. Stryker* case, CCH Dec. 9714, 36 BTA 326, it was held that check stubs, rent receipts, various income statements, etc., do not comprise records formal enough to be considered books of account. Similarly, in *Louis M. Brooks*, CCH Dec. 15,035, 6 TC 504, a so-called ledger with memorandum entries and slips of paper included in a binder were not deemed to be regular books of account in the commercial sense. In other words, the books of account must be somewhat formalistic, include daily entries of transactions, and generally be sufficiently clear and detailed to enable the auditing agent to determine the method of accounting employed.

With this general background, let us review the difficult problem of term commissions, one of the basic sources of gross income of an agency. This subject is chosen for detailed treatment since annual commissions present no tax problem other than whether or not they were received or accrued during the taxable year.

THIS ISSUE IN BRIEF

As you read this issue you will learn that:

. . . one method of preventing the issuance of duplicate registrations of automobile titles based on fraud and forgery is to finger print the original owner on his original registration and application. Page 295.

. . . the large weight of authority appears to hold that the operation, construction and maintenance of an airport by a municipality constitutes a proprietary function. Page 300.

. . . an insurance adjuster should have a knowledge of the processing of various types of cloth before he attempts to adjust textile losses. Page 305.

. . . the term "insurance" is sometimes used as a cloak to cover acts which are not related to the science of underwriting. Page 309.

. . . companies engaged in weather modification may be faced with liability claims. Page 314.

. . . the valuation in a marine policy is merely an agreement between the parties that the adjustment will be made without inquiry into the insurable interest of the insured. Page 323.

. . . the particular hazard to which the general practitioner is exposed is essentially the sum total of all fields of medicine. Page 335.

. . . products liability and *caveat venditor* do not and should not connote automatic judgment for a plaintiff. Page 339.

The receipt of substantial term commissions (on three- or five-year insurance policies) by insurance agencies has had the effect of creating peaks and valleys of taxable income in the first year such business is written and in the year of renewal. This has resulted in distorted tax liabilities in such years as compared with the intervening years. This is particularly true where the agency is operated as a proprietorship or partnership, and to a lesser extent where the corporate form is used, in view of the lack of graduated corporate tax rates.

The Supreme Court of the United States has held, and the Treasury Department has

continued to insist, that commissions must be reported as received and may not be reported over the period of the policy term (three or five years) irrespective of the contingency of being potentially liable for return commissions in the event of cancellation prior to the expiration date specified in the insurance policy. Usually, of course, good accounting requires that agencies reserve against this contingency, but such a reserve has been treated for tax purposes as purely voluntary—therefore not deductible. The leading decision covering this question is *Brown v. Helvering,* 4 USTC ¶ 1223, 291 U. S. 193. In that case the Supreme Court held that a general agent of a fire insurance company, whose books of account for income tax purposes were on an accrual basis, is not entitled, in ascertaining taxable income, to deduct from the amount of the commissions received on business written during the year an amount which, based on past experience, he anticipates he will be obligated to refund in future years by reason of policy cancellations. It also disposed of an alternative argument that such commissions were not earned until the full policy period had expired. The Supreme Court covered both questions, as follows:

"These charges on account of credits to the 'Return Commission' reserve account are claimed as deductions on the ground that they are expenses 'incurred', 'during the taxable year'. . . . But no liability accrues during the taxable year on account of cancellations which it is expected may occur in future years, since the events necessary to create the liability do not occur during the taxable year. . . .

". . . In respect to no particular policy written within the year could it be known that it would be canceled in a future year. Nor could it be known that a definite percentage of all the policies will be canceled in the future years. Experience taught that there is a strong probability that many of the policies written during the taxable year will be so canceled. But experience taught also that we are not dealing here with certainties. . . .

". . . The Board of Tax Appeals did not err in refusing [in alternative] to allocate to future years part of the overriding commissions on business written during the taxable year. . . .

". . . Moreover, the Board concluded that there 'is no proof that the overriding commissions contain any element of compensation for services to be rendered in future years'. The whole of the overriding commissions has at all times been treated as income of the year in which the policy was written."

Thus, it is well established, in line with the so-called claim-of-right cases headed by *North American Oil Consolidated v. Burnet,* 3 USTC ¶ 943, 286 U. S. 417, that money received under no restriction—contractual or otherwise—as to its disposition, use or enjoyment is income in the year received regardless of the contingent liability to return a part thereof upon the happening of some future event.

The most recent case involving this question is *Leedy-Glover Realty & Insurance Company, Inc.,* CCH Dec. 17,105, 13 TC 95, aff'd *per curiam,* 50-2 USTC ¶ 9480, 184 F. (2d) 833. The case is significant, coming years after the *Brown* case, since the court distinguishes the Supreme Court decision. In this case the agency wrote insurance on a larger number of properties owned or controlled by the Farm Security Administration. Under the agency contract with the insurance company, commissions on policies covering more than one year were placed in escrow and released each year ratably over the life of the term policies. The agency was obligated under the terms of the contract to service these policies over their full term. The Tax Court held that the agency, even though on the accrual basis, was taxable in each year only on that portion of the commissions which it became entitled to receive during the taxable year. After reviewing the *Brown* case, the Tax Court distinguished it, as follows:

"The reasons given by the Court for its ruling in that case clearly point the factual differences which distinguish it from the instant case. Here, there is uncontradicted evidence that the commissions payable to petitioner were in part consideration for services to be performed in the future; the petitioner has not at any time treated the full amount of the commissions as income in the years when the policies were written; and petitioner's deferment of the accrual of portions of the commissions to the years extending over the terms of the policies did not result from any change in its established method of accounting.

"Of even more importance, we think, is the fact that here, contrary to the situation in the *Brown* case, . . . the full commissions were not received by the petitioner in the years when the policies were written and were not subject to petitioner's unrestricted use and enjoyment."

(Continued on page 311)

What the Legislators Are Doing

Federal Legislation

A bill (S. 3612) to exclude commercial insurance from consideration as income for death pension purposes was introduced by Senator Langer of North Dakota. It was referred to the Committee on Finance.

The Secretary of the Treasury recently submitted his recommendations for a permanent life insurance company income tax law. In our last issue, we noted that the 1955 stopgap formula for taxing income of life insurance companies was extended to cover their 1957 income. The Secretary's recommendations were contained in a letter directed to Senator Harry F. Byrd, chairman of the Senate Finance Committee, and Representative Wilbur D. Mills, chairman of the House Ways and Means Committee. His recommendations were, in part, as follows:

"On the basis of our review and study, it seems evident that there are certain inadequacies in the present method of taxing life insurance companies. The present method does not recognize sources of net income other than investment income. Furthermore, it utilizes an averaging system, whereby the net taxable income of a life insurance company is measured by reference to an arbitrary or industry-wide standard of interest deductions, not by the actual experience and requirements of the individual company.

"Two possible solutions are presented herewith. The method of taxation to which it is suggested the Committee give first consideration would provide a long-range basis of taxation for life insurance companies bringing their taxable income concept into closer conformity with that of other corporate business. Such a concept should be designed to reflect, to the fullest extent practicable, the full net earnings of life insurance companies. It should at the same time provide comprehensive deductions for all expenses, interest, and reserve requirements, and all amounts paid or made available to policyholders. . . .

"Under this suggested method, life insurance companies would be entitled to net operating loss carryovers. To assure the best possible long-range measurement of life insurance company earnings and to preclude taxing annual amounts which are not true net earnings because of uneven experience, a longer loss carryback provision should be provided for life insurance companies than for other corporations, ranging up to 10 or 20 years.

"Consideration may also need to be given to some kind of special allowance or relief feature for small and new companies. Such a provision might be designed to recognize the special problems of the growing company. For example, a deduction might be allowed of 50 per cent, or some other fraction, of amounts up to some specified amount retained by a company as contingency reserves for the protection of policyholders.

"Provision should be made for a gradual transition to the new method over a three to five-year period. During this transition, the tax would be computed as a weighted average of the tax under the new method and the tax under the present stopgap method, with gradually increasing weight to the new method.

"The taxation of life insurance companies inevitably raises the question of its possible impact on policyholder savings, benefits, and insurance costs. The tax base discussed above would exclude all amounts paid to, or set aside irrevocably for the benefit of

any policyholder or group of policyholders. It would exempt additions to policy reserves including interest thereon; all cash insurance benefits made available to policyholders or their beneficiaries; and all policy dividends or similar rebates paid or refunded to policyholders. . . .

"Another adjustment which appears to deserve favorable consideration is one which would take account of deficiency reserves in existence on the effective date of the suggested plan. These particular reserves may be considered equivalent to an allocation of previously accumulated surplus, and in this light their recovery back into surplus would not constitute current earnings which should be subject to tax. . . .

". . . you may wish to consider an alternative more in line with the present method of taxation of life insurance companies which will nevertheless make tangible improvements.

"In this event, we suggest that you consider modification of the present law which will increase the portion of investment income subject to tax to accord more closely with the prevailing margin of investment income above required interest for policyholders, which margin is now about 30 per cent for the industry as a whole. Such a revised formula should not only bring the deduction for interest needs into closer line with the current situation, but should also be responsive to future changes in industry conditions from year to year. Consideration should be given to a further refinement of the present type of special interest deduction for companies with substantially less than the average margin of investment income.

"A second modification of the present formula which the Committee might consider is one which would assure a more reasonable tax on those companies with relatively small amounts of investment income and substantial earnings from insurance or underwriting sources, now entirely exempt from taxation. It is suggested that this might be made effective by means of a minimum tax provision, which would require that the tax should not be less than the liability computed at regular corporate tax rates on a specified proportion of the net gain from operations after policy dividends.

"Whatever tax formula is applied to the ordinary income of life insurance companies, their capital gains and losses should no longer be disregarded for tax purposes."

State Legislation

Accident and Health Insurance

Georgia . . . The "Nonprofit Medical Service Act of 1950" is amended by defining and specifying certain kinds of medical services which may be provided under a plan issued by a nonprofit medical service corporation. Act 403, Laws 1958, S. B. 155, approved and effective March 25, 1958.

Virginia . . . A new law authorizes the sale, under certain conditions, of accident air-trip insurance by means of vending machines. The State Corporation Commission and the Insurance Commissioner are authorized to regulate and supervise such sales and to adopt rules and regulations governing them. Laws 1958, H. B. 546, approved March 29, 1958, effective 90 days after adjournment.

Doing Business

Arizona . . . Persons engaged in the business of financing the purchase of real or personal property or of lending money on the security of real or personal property are prohibited from requiring the placing of insurance with an insurer or person specified by the lender. Chapter 78, Laws 1958, H. B. 264, approved March 17, 1958, effective 90 days after adjournment.

Georgia . . . A new law provides that reciprocal insurers authorized to do business in Georgia shall have and use a business name. The law prescribes the contents of such name, and requires the insurers to file a subscriber agreement. The insurers will sue and be sued in their business name, and they will file a statement of their business name with the Insurance Commissioner, designating an agent for the purpose of service of process. In the event of a failure to make this designation, the Insurance Commissioner will be deemed to be the insurer's agent for the service of process. Service may be had in accordance with the provisions of the "Unauthorized Insurers Process Act." Act 447, Laws 1958, approved March 25, 1958, effective immediately.

Mississippi . . . Domestic insurance companies will be examined at three-year intervals. Compensation for the examination of the domestic companies was changed to a maximum of $35 per day. Laws 1958, H. B. 403, approved March 26, 1958, effective from and after its passage.

Another new Mississippi law provides that domestic insurance companies must

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Titles to Stolen Automobiles

By WILLIAM E. MOONEY

As a solution to curbing registration of stolen automobiles, the author suggests the fingerprinting of the original owner on the original registration and application.

STEALING AUTOMOBILES is a major crime that does not seem to diminish, no matter how effective or certain the punishment. Records show that such thefts range from the "pranks" of teenagers who desire temporary transportation, to the need for "getaway" cars for gangsters, and then to the tasks of the organized mobs that use stolen cars for profit and have been known to take orders for specific types of vehicles.

In 1958 it is estimated that, in the United States, 354,860 motor vehicles will be stolen. This averages close to 1,000 cars a day for every day in the year. It also shows an increase of nearly 50 per cent in the past three years.[1] The theft of motor vehicles is tremendous in its import, but many of those that are recovered are wrecks and of little or no value. The complacency of the public on this phase of crime is to be marveled at. Even increasing insurance rates does not seem to modify the public's attitude—any animosity is directed at the insurance companies.

According to recent statistics, only one thief is apprehended for every two vehicles that are stolen. The number of convictions runs well below that figure.

In addition to the statutes of the various states relative to the theft of motor vehicles, there is the federal Dyer Act, sometimes known as the National Motor Vehicle Theft Act. The Dyer Act is specific in itself and does not follow the common law or state statutory law on stealing of automobiles.[2] For some time the construction of this act has limited the ability of prosecuting officers to punish for thefts. Until the Supreme Court of the United States settled the problem in 1957,[3] the word "stolen" as used in the Dyer Act was held to mean the taking of personal property of another with the intent to deprive the owner of it permanently.[4] Consequently, this construction ruled out the taking of motor vehicles by those who intended to use them only for immediate transportation, or for such temporary purposes as to commit a robbery, or to be the "getaway" car in a murder. To prove intent was a most difficult task; and it slowed down or defeated many a prosecution, and gave many thieves a complete defense.

[1] Automobile thefts in the United States according to records of the Federal Bureau of Investigation (1957 and 1958 figures estimated, but based on percentage increase in 1955 and 1956 figures): 1954—215,940; 1955—227,150; 1956—263,720; 1957—305,915; 1958—354,860.

[2] *Boone v. U. S.*, 235 F. (2d) 939 (1956).

[3] *U. S. v. Turley*, 352 U. S. 407, 1 L. Ed. (2d) 430, 56 A. L. R. (2d) 1300 (1957).

[4] *Smith v. U. S.*, 233 F. (2d) 744, 746 (1956).

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The Supreme Court of the United States has now resolved the variances beween the various circuits. The Fifth, Eighth and Tenth Circuits gave the word "stolen" a narrow construction, while the Fourth, Sixth and Ninth Circuits favored a broader interpretation. The Supreme Court adopted a construction of the word so as to include various types of theft. This decision, however, was by a vote of six to three, so that there will be further attempts to have the Court change its mind or rationalize the opinion. It is safe to assume attempts will be made for a reversal of the opinion when new judges are named to the Court.

Registration of Titles

With the thousands of daily transactions in new and used motor vehicles, it would not be unusual to find difficulties arising over the registration of the titles to such cars. Naturally, there is also deviousness, trickery and artifice used in the endeavor to register stolen automobiles. Conversion of the vehicle, the forgery of the assignment of the title, fraud and misrepresentation, the tricks used to obtain valid assignments and duplicate registrations, are some of the phases that need to be noted.

Where public officials are induced to issue certificates of title through fraud, there arise serious situations that will be costly to the legitimate owners or mortgagees thereof.

Prudence should be the watchword when dealing with one who is about to sell a used motor vehicle. While one cannot avoid doing business with strangers, nevertheless there must be a verity to the certificate of title to the car. It would be an absolutely safe rule to purchase a motor vehicle or loan money on it as collateral only by dealing with one who has a known unimpeachable reputation. Stealing automobiles, to a great extent, would be slowed to a halt by such a process. However, many people and businesses could not exist if they had to actually know each individual with whom they were doing business. This puts them on notice to watch the operations of a forger, and to beware of fraud and misrepresentation, and the schemers that work on duplicate title registrations. In such situations, the simpler the transaction the less opportunity there would be for fraud, and conversely, if the situation seemed to be complex it would be one to avoid.

The statutes relating to certificates of title to motor vehicles are for the protection of the owners, those holding liens thereon and the general public.[5] Other cases have restated the purpose to be to make it difficult to transfer the title to an automobile by other than the rightful owner.[6] Most of the cases indicate that the law is to create "roadblocks" and that it is not a guarantee of title.

[5] The statute relating to certificates of title to motor vehicles is for the protection of owners, those holding liens thereon and the general public. (*Nichols v. Bogda Motors*, 118 Ind. App. 156, 77 N. E. (2d) 905 (1948); *Allied Investment Company v. Shaneyfelt*, 161 Neb. 840, 74 N. W. (2d) 723 (1956).)

[6] The purpose of the statute is to make it difficult to transfer the title to an automobile by other than the rightful owner. (*Sims v. Sugg*, 165 Kan. 489, 196 Pac. (2d) 191 (1948).)

The purpose of the statute is to prevent the disposal of stolen cars. (*Bankers Investment Company v. Meeker*, 166 Kan. 209, 201 Pac. (2d) 117 (1948); *Taylor v. Burdick*, 320 Mich. 25, 30 N. W. (2d) 418 (1948); *Securities Credit Corporation v. Pindell*, 153 Neb. 298, 44 N. W. (2d) 501 (1950); *Bank of Keystone v. Kayton*, 155 Neb. 79, 50 N. W. (2d) 511 (1951); *City National Bank & Trust Company v. Finch*, 205 Okla. 1340, 237 Pac. (2d) 869 (1951); *Weigelt v. Factors Credit Corporation*, 174 Pa. Super. 400, 101 Atl. (2d) 404 (1954); *Reece v. State*, 197 Tenn. 383, 273 S. W. (2d) 475 (1954); *Clanton v. Thigpen*, 226 S. W. (2d) 850 (Tex. Civ. App., 1950).)

Once having obtained a certificate of title, there cannot be a valid sale of a motor vehicle without the transfer of the certificate of title.[7] The number of times innocent persons are victimized by fraudulent certificates of title is hard to calculate, but the litigated cases indicate that there must be a great many.

One who attempts to purchase a used automobile without obtaining an assignment of the certificate of ownership acquires no title whatever and has no insurable interest therein. The provisions of the statute are mandatory and are rigidly enforced.[8]

Duplicate Certificates

Moving such vehicles across state lines also brings other problems into consideration. Duplicate certificates of title often are issued, and then more trouble may arise. With two certificates of title in existence there are wide opportunities for fraud and theft. When a certificate of title indicates that an automobile was previously registered in another state, it may become the duty of the purchaser to obtain a statement from the recording officer of the other state as to liens recorded there.[9]

In some places duplicate certificates of title are difficult to obtain,[10] but in others they seemingly may be obtained without much trouble, and even without affidavits setting forth important facts.[11]

The statute must be respected with reference to recording for the purpose of protecting liens. Delay in recording is dangerous and may be fatal.[12] Recording may not be helpful where the statute requires the certificate of title to show all liens. A certificate of title takes precedence over a chattel mortgage which is not recorded on the certificate,[13] as the certificate establishes ownership.[14]

Prudence should be the watchword when dealing with one who is about to sell a used motor vehicle.

A certificate of title is not a negotiable instrument.[15] Title cannot be passed by a forged document.[16] Forgery of the wife's title certificate by the husband does not give one a good title.[17] Fraud and deception in gaining title will not protect a subsequent holder for value.[18] A certificate of title is voidable as to the real owner where there was fraud in the transaction.[19]

All of these rules are well to know, as one may lose both his money and his car if he has trusted too much in a stranger and in the certificate of title.

General Rules Respecting Titles

The general rules with reference to certificates of title may be said to be as follows:

A certificate of title is essential but it is not conclusive of ownership. Thus, the possession of a certificate of title registration is not an absolute muniment of title.[20]

[7] *G. F. C. Corporation v. Rollins*, 221 La. 166, 59 So. (2d) 108 (1952), aff'g 50 So. (2d) 460.

[8] *Kelso v. Kelso*, 306 S. W. (2d) 534 (Mo., 1957).

[9] *Vincent v. General Motors Acceptance Corporation*, 75 So. (2d) 778 (Fla., 1954).

[10] *Shelton v. U. S.*, 165 F. (2d) 241 (D. C., 1947); *In re Banks*, 69 F. Supp. 227 (Tex., 1947).

[11] *Shelton v. U. S.*, cited at footnote 10.

[12] *Citizens National Trust & Savings Bank of Los Angeles v. Gardner*, 161 F. (2d) 530 (Calif., 1947).

[13] *Hinton v. Bond Discount Company*, 214 Ark. 718, 218 S. W. (2d) 75 (1945).

[14] *Nash Miami Motors v. Bandel*, 47 So. (2d) 701 (Fla., 1950).

[15] *Blaylock v. Herrington*, 219 Ark. 939, 245 S. W. (2d) 576 (1952); *Codding v. Jackson*, 132 Colo. 320, 287 Pac. (2d) 976 (1955).

[16] *White v. Pike*, 240 Iowa 596, 36 N. W. (2d) 761 (1949).

[17] *Blaylock v. Herrington*, cited at footnote 15.

[18] *Chetopa State Bank v. Manes*, 221 Ark. 784, 255 S. W. (2d) 957 (1953).

[19] *In re Robert E. Lee, Inc.*, 129 F. Supp. 920 (Ohio, 1955).

[20] *Lynn v. Herman*, 72 Cal. App. (2d) 614, 165 Pac. (2d) 54 (1946); *Irvine v. Wilson*, 137 Cal. App. (2d) 843, 289 Pac. (2d) 895 (1955); *Livingston v. National Shawmut Bank*, 62 So. (2d) 13 (Fla., 1952); *First National Bank of Nevada v. Swegler*, 336 Ill. App. 107, 82 N. E. (2d) 920 (1948); *American States Insurance Company v. White*, 341 Ill. App. 422, 94 N. E. (2d) 95 (1950); *Nichols v. Bogda Motors*, 118 Ind. App. 156, 77 N. E. (2d) 905 (1948); *Auto Underwriters v. Tite*, 119 Ind. App. 251, 85 N. E. (2d) 365 (1949); *Central Finance Company of Peru v. Garber*, 121 Ind. App. 27, 97 N. E. (2d) 503 (1951); *Champa v. Consolidated Finance Company*, 231 Ind. 580, 110 N. E. (2d) 289 (1953); *Clarke Auto Company v. Fyffe*, 124 Ind. App. 222, 116 N. E. (2d) 532 (1954); *Jones v. Kilborn*, 125 Ind. App. 88, 122 N. E. (2d) 739 (1954); *Krietenstein v. Robinson*, 126 Ind. App. 83, 129 N. E. (2d) 368 (1955); *Dee v. Sutter*, 222 S. W. (2d) 541 (Mo. App., 1949); *Snyder v. Lincoln*, 150 Neb. 581, 35 N. W. (2d) 483 (1948); *Terry Brothers & Meves v. National Auto Insurance Company*, 160 Neb. 110, 69 N. W. (2d) 361 (1955); *Burns v. Commonwealth Trailer Sales*, 163 Neb. 308, 79 N. W. (2d) 563 (1956); *Allstate Insurance Company v. Enzolara*, 164 Neb. 38, 81 N. W. (2d) 588 (1957); *Popkin v. Credit Reliance Company*, 34 Berks 141 (Penn., 1944).

A registration certificate was held not to be a muniment of title. (*Taplinger v. Northwestern National Bank in Philadelphia*, 101 F. (2d) 274 (Penn., 1939); *Diever's Estate v. Meade*, 33 Del. Co. 307 (P. Ct. of Comm. Pl., 1945).)

It has become an element of defense, Mr. Mooney writes, to inject some light, airy matters into automobile thefts so that if the court, jury and prosecutors laugh over it, the verdict will be acquittal.

There is a presumption of ownership by possession of the certificate of title coupled with possession of the vehicle.[21] But, this presumption may be overcome.[22]

The owner of an automobile insofar as the registration statute is concerned is the one who has a registered title in his name,[23] and the certificate of title has been held to be prima-facie evidence of ownership.[24]

While the possession of an automobile may be quite apparent, a transfer of the certificate of title by assignment, to be valid, must be by the actual owner.[25] A forged or fraudulent assignment is invalid, and will not pass title, where the seller is a total stranger.[26] What may be necessary to establish identity is the problem of the one purchasing the vehicle.

It has been noted that possession of a certificate of title is not conclusive of ownership. While such a certificate may raise a presumption of ownership, such may be overcome by evidence of the actual ownership of the automobile.[27]

Forgery of the registration of title to the vehicle has been resorted to on numerous occasions. Naturally, a thief would resort to such an operation. His inclination so to do would be increased by the ease with which such a transaction might be consummated. Some states have indicated that the use of forged checks[28] does not constitute one a thief, and such a transaction would not be a "theft" within the meaning of an automobile theft policy.

A duplicate certificate of ownership may be issued only to the legal owner of the vehicle.[29]

It goes without saying that one who derived title from a person who stole an automobile must deliver up possession to the one from whom the automobile was stolen.[30]

Remedy for Wrongful Issuance of Title Registration

A short-lived remedy was noted by the *Paglia* case in New York. This case held that the state was liable for the value of the motor vehicle where the Bureau of Motor Vehicles issued a title registration on a stolen automobile to one who bought the stolen automobile from a dealer who, in turn, had purchased it from the thief, relying on the title registration. None of the parties knew, or had occasion to know, that it was stolen.[31] But this case was reversed in the Appellate Division[32] and the reversal supported in a later case.[33] It seems this sort of remedy is unavailable. Courts will probably continue to hold that reliance on the title certificate alone will constitute contributory negligence and prevent recovery.

[21] *Coffey v. Williams*, 69 Ariz. 126, 210 Pac. (2d) 959 (1949); *Aclin v. Manhattan Credit Company*, 225 Ark. 1028, 287 S. W. (2d) 451 (1956), but see *Chetopa State Bank v. Manes*, cited at footnote 18; *First National Bank of Ogallala, Nebraska v. Chuck Lowen, Inc.*, 128 Colo. 104, 261 Pac. (2d) 158 (1953); *Chiplock v. Steuart Motor Company*, 91 Atl. (2d) 851 (D. C., 1952).

[22] *Staunton Industrial Loan Corporation v. Wilson*, 190 F. (2d) 706 (Va., 1951); *United States Casualty Company v. Ohio Casualty Insurance Company*, 208 F. (2d) 451 (Tex., 1954); *In re Mitchell*, 104 F. Supp. 969, aff'd, 202 F. (2d) 426 (Ohio, 1952); but see *In re Robert E. Lee, Inc.*, cited at footnote 19; *Oslund v. Mansfield*, 107 F. Supp. 220 (Alaska, 1952); *Mossler Acceptance Company v. Johnson*, 109 F. Supp. 157 (Ark., 1952); *Caccamo v. Swanton*, 94 Cal. App. (2d) 957, 212 Pac. (2d) 246 (1949); *Gates v. Levers*, 108 Cal. App. (2d) 131, 238 Pac. (2d) 143 (1951); *Lake v. Mercantile Acceptance Corporation*, 111 Cal. App. (2d) 431, 244 Pac. (2d) 764 (1952); *Triggs v. Zicovich*, 117 Cal. App. (2d) 768, 257 Pac. (2d) 60 (1953); *Burakowski v. Guistas*, 134 Conn. 905, 56 Atl. (2d) 461 (1947); *McQueen v. M. & J. Finance Company*, 59 So. (2d) 49 (Fla., 1952); *Burns v. Commonwealth Trailer Sales*, cited at footnote 20; *Allstate Insurance Company v. Enzolara*, cited at footnote 20; *Zeller v. Preferred Mutual Fire Insurance Company*, 168 N. Y. S. (2d) 260 (1957).

[23] *Noorthoek v. Preferred Automobile Insurance Company*, 292 Mich. 561, 291 N. W. 6 (1940).

[24] *Larison-Frees Chevrolet Company*, 163 Ore. 276, 96 Pac. (2d) 1067 (1940); *Commercial Finance Company v. Burke*, 173 Ore. 341, 145 Pac. (2d) 473 (1944).

[25] *Hartford Fire Insurance Company v. Tubb*, 242 F. (2d) 921 (Tex., 1957).

[26] *Bustin v. Craven*, 57 N. M. 724, 263 Pac. (2d) 392 (1953).

[27] *Poteet v. Simmons*, 172 Kan. 310, 240 Pac. (2d) 147 (1952).

[28] *Cox v. World Fire and Marine Investment Company*, 239 S. W. (2d) 538 (Mo. App., 1951).

[29] *Anderson v. Commercial Credit Company*, 110 Mont. 333, 101 Pac. (2d) 367 (1940).

[30] *Ohio Casualty Company v. Guterman*, 97 Ohio App. 237, 125 N. E. (2d) 350 (1954).

[31] *Paglia v. State*, 99 N. Y. S. (2d) 878 (1950), rev'd in Appellate Division, 105 N. Y. S. (2d) 597 (1951); see also *Kells v. State*, 107 N. Y. S. (2d) 821 (1951).

[32] 105 N. Y. S. (2d) 597 (1951).

[33] *Kells v. State*, cited at footnote 31.

Conclusion

Studies are going forward regularly by a number of different agencies to discourage and prevent the stealing of motor vehicles. This crime contributes much to the current juvenile delinquency; it has a great deal to do with the increase in bank robberies, murders and the like; and, in general, it saps the morale and economy of the nation.

Carelessness on the part of the general public adds something to the problem, as countless persons leave their vehicles with the ignition keys therein and with doors unlocked—frequently with the engines running. Two very recent truck robberies were practically invited by reason of the fact that the engines were running, the cab doors were open and the street clear of other vehicles. With some juveniles there seems to be no immorality to stealing automobiles. We have adopted so many clichés that the word "steal" is rarely used. The vehicle is "just taken," "needed for a joy ride," "no one would object" and "we didn't actually steal it—we were going to bring it back."

Even in some courts, the matter is treated with some lightness. I have been present in courtrooms when there seemed to be general laughter at the idea of the joy ride that the youngsters took; in fact, it has become an element of defense to inject some light, airy matters into automobile thefts so that if the court, jury and prosecutors laugh over it, the verdict is acquittal. Probation for these offenses means little or nothing to many people. Something serious will have to be done soon to stop the wholesale thefts. Otherwise, people will have to anchor their cars when they stop—with locks and chains that cannot be easily broken. Insuring companies will find it an unprofitable business; and above all this will be the contempt that many people will have for stealing which then may be applied to anything else.

One way to prevent the issuance of duplicate registrations of title when based on fraud and forgery is to provide fingerprinting by the original owner on the original registration and application. Many banks have eliminated many forgeries in such a manner.

There is always the possibility that in places where the title registrations of used vehicles are not reliable and cannot be relied on, some enterprising insurance companies might be willing to guarantee the titles.

[The End]

EFFECT OF AUTO DESIGNING ON PREMIUM RATES

The frills of automobile designing might be sobered down, says Mott M. Keys, actuary for the Oklahoma Insurance Board, in reviewing the present-day situation and its effect on the insurance industry. Mr. Keys contends that since these frills cost insurance companies many millions of dollars annually, the regulatory agencies in the nation should be allowed to collect an additional 20 per cent or so in rates on certain makes and models of automobiles now on the market, and on new models soon to be offered to the public when tooling and new models are in production.

In a recent paper delivered before the National Association of Independent Insurers, William P. Henderson made many pertinent observations, Mr. Keys noted. The masses of chrome on the front and rear of a car produce an added physical damage premium of $3 or $4 million annually, which the insurers must collect. Thirty million dollars' worth of 1957 models are covered now by the insurance companies. There is a group of parts on these cars which when totaled at the retail installed price exceed 10 per cent of the cost of the car.

These parts consist of the front and rear bumper assemblies, the two front fender panels and trim, the two rear fender panels and trim, the deep-sculptured doors, the front and rear gingerbread adornments. These parts take 80 to 90 per cent of the collision claim dollar, and each year the price of these parts increases about 10 per cent more than the price of the car on which the premium is based.

The Nash and Hudson cars, which are manufactured without frames, are being plus-rated by some companies which state that they have facts and figures to support the increase in rates. The Lincoln and Thunderbird are made with what is called "unitized" construction, that is, they have no frame or subframe, or the heavy framework found in earlier frameless construction, and are made with thin metal.

Mr. Henderson concluded by stating that "In the light of these trends and the facts about the useless restyling of automobiles the various states would do well to recognize and permit a surcharge by the companies on these new designed automobiles."

Whether or not governmental units are liable for the torts of their employees, agents or servants is resolved in this analysis of the current status of the law with regard to

Governmental v. Proprietary Function in

THIS ARTICLE is limited to a consideration of those cases where the litigation brought into issue the specific legal point of whether the operation of an airport by a municipality or some other governmental unit is governmental or proprietary in function; and, hence, whether or not there is liability on the part of the governmental unit for the negligence of its employees, agents or servants.

This article does not include cases which were decided subsequent to those cited, where the courts of the jurisdiction have simply reaffirmed the original holding, except where the affirmation is by a court of higher jurisdiction. It also does not include cases of bailment (airplanes lost by fire), contract (actions of municipality *ultra vires*), injunction (exclusive franchise at airport sought to be stopped) or taxation (issuance of bonds and use of bond receipts). Nor does this article cover the liability of the United States Government under the Federal Tort Claims Act.

Citations are not numbered in the order in which they appear in the text, but rather they are listed in the appendix in alphabetical order by states. In this way, by noting those citations which apply to the reader's jurisdiction, he may immediately determine the rule in his state.

General Rules

While the general rules which apply to the tort liability of political subdivisions are well known and have been stated frequently (29), they are repeated here for focus as far as the ensuing discussion is concerned. The test governing liability which is usually applied is that of whether the function or action is governmental or proprietary.

States.—It can be stated unequivocally that states are not liable in tort regardless of whether the function has a governmental or proprietary flavor (4).

Counties.—The rule among the jurisdictions is divided. Some say that since the county is an arm of the state, it cannot be liable. Some states, however, are beginning to hold counties liable and are applying the same rule as is applied to municipalities (16, 20).

Municipalities.—There appears to be a large majority of jurisdictions which hold that municipalities are acting in a proprietary manner when they are constructing, operating or maintaining an airport, whether or not there is a statute covering the situation.

Governmental and Proprietary Functions Differentiated

The usual tests which are applied are clearly expounded in the texts (29). However, their application in the field of the operation of airports has been extremely checkered, and the line of demarcation between governmental and proprietary functions is a difficult one to discern. In one state (Georgia), the identical statute has been held by the same court to be both governmental (6) and proprietary (7), without any intervening action on the part of the state legislature and without any recognition of the prior decision in the later one. So also, under statutes whose wording is almost identical, the courts of some states have held that action was proprietary (7, 16, 17, 18), while in other states the courts have held that the action was governmental (2, 26). To further confuse the situation, the courts of one state (Texas) with an assist from the federal courts have said that the function was proprietary (25). Subsequently, the state legislature adopted an additional statute quite similar to those mentioned above. The first interpretation of this was by the federal courts, which held that the function was governmental (26). Then, without any further benefit of action by the state legislature, the state court has interpreted this later statute as being proprietary (27).

Actually, the classification of these cases can be split into two main classes:

the Operation of Airports

By M. B. SPAULDING, Jr.

(1) those where a statute of some sort is involved (see discussion under "Statutes and Ordinances Enacted") and

(2) those where no statute is involved. In all cases where there was no statute involved and the suit was against a municipality or county, the courts have unanimously held that the operation of an airport by such governmental units is proprietary in nature (1, 5, 10, 13, 20, 21).

Statutes and Ordinances Enacted

The statutes or ordinances enacted by the various states, cities and municipalities cover a wide range of purposes or intents. They can be divided into three main categories:

(1) **Simple statement of policy.** — The wording found here is generally along the line that the functions are "declared to be public and governmental, exercised for a public purpose, and matters of public necessity." Such wording is found in the statutes of those states which have adopted the Uniform Airport Act (2, 6, 7, 16, 17, 18, 26). This type of policy statement has been held to be governmental (2, 6, 26) as well as proprietary in character (7, 16, 17, 18).

In one case, it was held by the court that even though it was a declaration by the legislature that the operation of an airport is in furtherance of a governmental function, the legislature could not exempt such operations except by the enactment of a specific immunity statute (18). (Contra, see (15) and (26).)

(2) **Contingent immunity from liability.** —These cases seem to fall into those where the immunity is available unless (a) the municipality fails to correct a known defect (3) or (b) the liability falls outside that specified for a particular kind of function—in this case a public park (8). In other words, the statute states that the liability in the operation of an airport shall be no greater than that in the operation of a public park.

In the case of the type of immunity afforded by (b) above, the courts have construed the statute very strictly. Thus, in order to obtain the immunity, the function or action must be for the purposes of the airport. As an example: While the land on the airport was rented for agrarian purposes (hay), it was sprayed by the airport to kill bugs. This spray killed bees feeding on the grass but belonging to an adjoining land owner. Under this statute it was held that the function was proprietary and, hence, the municipality was liable (9).

(3) **Immunity under a statute.**—Of course, a state aeronautics commission would be granted complete immunity under its authorizing statute, without any specific exemption in the wording of the statute. This would be because such an organization is a direct arm of the state government and, hence, operates always in a governmental way (4). The statutes which have been construed by the courts and which have been held to grant immunity to other governmental units are those found in Montana (30) and Tennessee (31). It is interesting to note that neither one of these statutes grants immunity by name to the counties of the state. Presumably, the courts would extend this immunity to the counties since, as pointed out above, the general rule still is that a county is an arm of the state. It is also interesting to note that Montana makes no mention of the type of function involved but simply grants immunity, while Tennessee very specifically states that the function is governmental and then proceeds to grant immunity.

In another case, a city had been empowered under a state statute (Mississippi Code, 1928, Chapter 63) to acquire land and to operate an airport. The city then passed an ordinance disclaiming any liability and at the same time caused the airport to be posted with a notice of this

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disclaimer. The court, however, held that the ordinance was not a public statute; that the notice was insufficient; that the function was proprietary; and, hence, that the city was liable (11). This was subsequently affirmed by the Mississippi Supreme Court (12).

The statutes granting immunity also pose interesting state and federal constitutional questions. This point was raised in one state, and the state court of appeals held that such a statute was unconstitutional (25). Subsequently, the state legislature, without repealing the offending sections of the statute, passed another statute whose wording was substantially similar to those outlined under "Simple statement of policy," above. A United States Court of Appeals then held this wording to grant governmental immunity (26) without constitutionally passing on the question. Subsequently, the state court of appeals ruled that such is not the case (27).

In another state, the judges of the state supreme court have handed down an opinion in the form of a prejudgment of a proposed statute, when asked to do so by the state senate. This opinion states that such a statute is constitutional (15).

In still another state, such a statute was brought directly into question and was held to be constitutional (22).

Insurance Carried and Its Effect

Two cases were found in which the carrying of insurance was drawn into question. Both of these were in states where immunity is granted by statute. In a case in Montana, the court ruled that even though the City of Great Falls did carry insurance, in the absence of a statute waiving the municipality's immunity from suit, such insurance was not a waiver (14). In Tennessee, on the other hand, the United States District Court held that the carrying of insurance was a waiver of the immunity to the extent of the amount of coverage of the insurance (23). This was affirmed by the United States Circuit Court (24).

An examination of the cases dealing with the effects of insurance when carried under an immunity statute indicates that the states have made a number of arrangements, which can be generally categorized as follows:

(1) **Primary liability.**—Some states have enacted laws creating a primary liability on the part of the governmental agency and have then authorized the purchase of insurance to protect the agency in the event of loss.

(2) **Indirect liability.**—Still other states have empowered the agency to procure liability or indemnity insurance, provided that (a) the action must be brought directly against the insurance carrier (32) or (b) the liability of the insurer shall be determined by a judgment obtained by the injured person against the agency (33).

(3) **Limited liability.**—In one state (Tennessee), the courts have held that under an immunity statute the purchase of insurance constitutes a waiver, and the agency is liable provided the judgment is so limited that it would be satisfied only out of insurance (23, 24).

Circumstances in Which Liability Was at Issue

Cases where the tort liability of a municipality or other governmental unit was the primary question, and where the court was required to decide whether the act was governmental or proprietary, were found in 20 jurisdictions. As is always the case, and as would be expected, these cases not only cover a large variety of situations, but even in the same or similar factual situations, different rulings were handed down by the different courts involved. The cases are tabulated below by subject matter, together with a notation for each as to whether the municipality was found to be acting in a governmental or proprietary manner and whether there was a finding of negligence. Also, in some instances there is indicated, by a brief word description, a further clarification of the fact situation. The factual situations can be divided into the following major categories:

Property damages

(A) Loss of aircraft

(1) Due to fire

(a) Alabama — proprietary — liable (1)

(b) Iowa — governmental — not liable (8)

(c) Kansas — proprietary — liable (10)

(d) Nevada — proprietary — liable (16)
(e) Oklahoma — proprietary — liable (19)
(f) Texas — governmental—not liable (26)
(g) Texas — proprietary — liable (27)
(h) West Virginia—governmental—not liable (28)

(2) Failure to tie down
(a) Mississippi — proprietary — liable (11, 12)

(B) Damage to aircraft
1. During landing
(a) Florida (collision with unlighted steamroller at intersection on runways) — proprietary—liable (5)

(2) Taxiing
(a) Missouri (ran into snow-covered ditch at edge of apron) —proprietary—liable (13)

(C) Damage to crops
(1) Loss due to spraying
(a) Iowa—proprietary—liable (9)

Personal injuries

(A) Use of defective truck in construction work
(1) California—proprietary—liable (3)

(B) Falling or tripping by visitor
(1) Connecticut (outside terminal in parking lot)—governmental—not liable (4)
(2) Georgia (inside terminal on floor) —proprietary—liable (7)
(3) Georgia (hole in road)—governmental—not liable (6)
(4) Montana (inside terminal on floor) —governmental—not liable (14)
(5) Oregon (temporary wire outside terminal)—proprietary—liable (20)
(6) Pennsylvania (outside on step)—proprietary—liable (21)
(7) Tennessee (outside terminal along path)—governmental—not liable (no insurance) (22)
(8) Tennessee (outside terminal on step)—governmental—liable (to extent of insurance) (23, 24)

(C) Watching exhibition
(1) Texas—proprietary—liable (25)

Death—accidental

(A) Arkansas (employee killed by explosion of solvent)—governmental—not liable (2)

(B) North Carolina (night watchman reporting for duty shot and killed by man he was relieving)—proprietary —liable (17, 18)

Summary

Based upon this examination of the decided cases, it appears that the large weight of authority holds that the operation, construction and maintenance of an airport by a municipality constitutes a proprietary function; and as such, the municipality is liable for the torts of its agents, officers or employees.

It is interesting to note that the courts, in ruling on this point in those cases where another defendant was involved (that is, where the airport and an airline were sued jointly), have still held the municipality liable or not liable, as the case may be, even though portions of the terminal building had been rented to the airline. **[The End]**

APPENDIX

(1) *City of Mobile v. Lartigue*, 23 Ala. App. 479, 127 So. 257 (1930).

(2) *Kirksey v. City of Fort Smith*, — Ark. —, 300 S. W. (2d) 257 (1957).

(3) *Coleman v. City of Oakland*, 110 Cal. App. 715, 295 Pac. 59 (1930).

(4) *Woodmansee v. State of Connecticut et al.*, — Conn. —, 4 Avi. 17,273 (1953).

(5) *Peavey v. City of Miami*, 5 Negligence Cases 802, 146 Fla. 629, 1 So. (2d) 614 (1941).

(6) *Mayor, etc. of Savannah v. Lyons*, 54 Ga. App. 661, 189 S. E. 63 (1936).

(7) *Caroway v. City of Atlanta*, 20 Negligence Cases (2d) 665, 85 Ga. App. 792, 70 S. E. (2d) 126 (1952).

(8) *Abbott v. City of Des Moines*, 6 Negligence Cases 41, 230 Iowa 494, 298 N. W. 649 (1941).

(9) *Brown v. Sioux City*, 242 Iowa 1196, 49 N. W. (2d) 853 (1951).

(10) *Wendler v. City of Great Bend*, 7 Negligence Cases (2d) 1100, — Kan. —, 316 Pac. (2d) 265 (1957).

(11) *Brummett v. City of Jackson*, 19 Negligence Cases 286, 211 Miss. 116, 51 So. (2d) 52 (1951).

(12) *City of Jackson v. Brummett*, 5 Negligence Cases (2d) 22, 224 Miss. 501, 80 So. (2d) 827 (1955).

(13) *Behnke v. City of Moberly*, 20 Negligence Cases 69, — Mo. —, 243 S. W. (2d) 549 (1951).

(14) *Holland v. Western Airlines*, 154 F. Supp. 457 (Mont., 1957).

(15) *Opinion of the Justices*, — N. H. —, 134 Atl. (2d) 279 (1957).

(16) *Granite Oil Securities v. Douglas County*, 18 Negligence Cases 436, 67 Nev. 388, 219 Pac. (2d) 191 (1950).

(17) *Rhodes v. City of Asheville*, 16 Negligence Cases 922, 230 N. C. 134, 52 S. E. (2d) 371 (1949).

(18) *City of Asheville v. Rhodes*, 230 N. C. 759, 53 S. E. (2d) 313 (1949).

(19) *City of Blackwell v. Lee*, 178 Okla. 338, 62 Pac. (2d) 1219 (1936).

(20) *Mollencop v. City of Salem*, 139 Ore. 137, 8 Pac. (2d) 783 (1932).

(21) *Daniels v. County of Allegheny*, 6 Negligence Cases (2d) 989, 145 F. Supp. 358 (Pa., 1956).

(22) *Stocker v. City of Nashville*, 1 Negligence Cases 666, 174 Tenn. 483, 126 S. W. (2d) 339 (1939).

(23) *Bailey v. City of Knoxville*, 113 F. Supp. 3 (Tenn., 1953).

(24) *City of Knoxville v. Bailey*, 4 Negligence Cases (2d) 870, 222 F. (2d) 520 (Tenn., 1955).

(25) *Christopher v. City of El Paso*, — Tex. App. —, 98 S. W. (2d) 394 (1936).

(26) *Imperial Production v. City of Sweetwater*, 3 Negligence Cases (2d) 448, 210 F. (2d) 917 (Tex., 1954).

(27) *Wren v. City of Corsicana*, — Tex. App.—, 307 S. W. (2d) 102 (1957).

(28) *Van Gilder v. City of Morgantown*, 136 W. Va. 831, 68 S. E. (2d) 746 (1949).

(29) 37 American Jurisprudence, "Municipal Corporations," Sec. 114.

(30) Sec. 1-502, Revised Code, 1947. The Montana statute reads: "No action or suit sounding in tort shall be brought or maintained against the state or any municipality thereof, or the officers, agents, servants, or employees of the state or any municipality thereof on account of any act done in or about the construction, maintenance, enlargement, operation, superintendence or management of any airport or other navigation facility."

(31) Secs. 2726.10-2726.19, 1950 Code. The Tennessee statute reads: "The construction, maintenance, and operation of municipal airports is declared a public governmental function, and no action or suit shall be brought or maintained against any municipality, or its officers, agents, servants, or employees, in or about the construction, operation, maintenance, superintendence or management of any municipal airport."

(32) *Earl W. Baker & Company v. Lagaly*, 144 F. (2d) 344; 154 A. L. R. 1098.

(33) *Taylor v. Knox County Board of Education*, 292 Ky. 767, 167 S. W. (2d) 700, 145 A. L. R. 1333.

MANAGEMENT'S CONTROL OF UNEMPLOYMENT

Management must recognize that unemployment benefits payments are a significant cost of doing business and must make a concerted effort to control that cost, Russell L. Hibbard, director of unemployment and workmen's compensation, General Motors Corporation, Detroit, told executives attending the American Management Association's spring insurance conference on May 6.

The three main ways available to employers to control the amount of their "not working payrolls" are through good legislation, good administration and stabilization of employment, Mr. Hibbard said. It is of "vital importance" for all employers to take an active interest in unemployment compensation legislation.

According to Mr. Hibbard, the factors of major importance in keeping costs within bounds under state laws are (1) a system of experience rating based on benefit payments; (2) an adequate range of tax rates, so that only a few employers will be frozen at the minimum or maximum tax rates; and (3) full and current accounting to the employer for benefit payments affecting his tax rate. Weekly lists of benefit payments bring home forcibly the cost of the employer's not-working-payroll and enable him to detect and protest improper payments promptly, Mr. Hibbard said.

Employers should also concern themselves with the benefit formula and eligibility requirements of the state law, he cautioned, because these provisions affect such cost factors as the incentive to work and the ability of the state administrator to distinguish between the deserving and the undeserving benefit claimants. Employer interest in legislation need not be reactionary, he said, since close analysis of state law provisions will usually disclose opportunity for savings that are in the best interests of all concerned—deserving employees, the public and the taxpaying employers.

Adjustments of Textile Losses

By ANTHONY C. GIBBS

This paper was presented before the Brooklyn Law School Third Annual Insurance Forum, March 20, 1958. Mr. Gibbs is president, Wm. M. Mortimer Co., Inc., New York City.

THE largest industry in New York City is the textile industry and its related needle trades. The subject of textiles is so complex —whole libraries have been compiled on the subject—that I shall limit myself to a very short consideration of "Adjustments of Textile Losses."

Textiles generally fall into three categories: vegetable, animal and man-made. Obviously, vegetable is the oldest of the textile fibers. Perhaps linen was the first prepared fiber. It is believed that the flax plant under cultivation today is practically identical with the species of the flax plant utilized by the Egyptians of ancient history.

Cotton is perhaps our third oldest fiber. The natives of India for hundreds of years have been weaving fine and delicate cotton fibers.

The manufacture of cotton cloth did not reach a large volume in England until about the time of our American Revolution because England was essentially a wool-producing country. However, it was the English, Irish and Scottish who brought cotton to our shores.

Sometime between the development of linen and cotton, man domesticated sheep and goats. Their wool and hair constituted probably the second oldest known fiber. After this, man went into an era where his clothing basically came from animals, and with the coming of civilization, great markets developed for these animal fibers. For hundreds of years the center of the world's wool trade has been in England. The industry has been so important in the economic life of England that in approximately 1350, Edward III ordered the Lord Chancellor to "sit on a wool sack" as a reminder to bear in mind always the welfare of England's great wool industry. Today the "wool sack" is the recognized seat of this important government official; it is a bag of wool, which even today he sits upon—although it has been since made into the form of a divan.

Another animal fiber is silk, which according to experts originated in China. Europe had no knowledge of it until about 320 B. C., when Alexander the Great is supposed to have brought it back from one of his Persian campaigns. It was the French and Swiss who fostered silk in our country, with some English, Italians and a smattering of Germans from the Palatinate. In modern times the vast amount of silk importing has centered in New York. The manufacture originally was in New Jersey, especially in the area around Paterson, which became known as the "Silk City." Later, it extended into Pennsylvania and elsewhere.

Geographically speaking, and for good reasons, linens and woolens are concentrated in the New England states, silk in the Middle Atlantic states and cotton in the Southern states. Of course there are some exceptions, but this is the general pattern that remained constant until after World War I, when man-made fibers first were spun into actual cloth.

In 1884 a Frenchman obtained a French patent for the first artificial fiber. He had made a careful study of the habits of the silkworm and brought out a nitrocellulose fiber, exhibiting it at the Paris Exhibition in 1889. He called it "artificial silk," but it was actually the first rayon. While it was a poor sample, it nevertheless was the beginning of the modern man-made fiber industry.

We in the United States imported rayon material as far back as 1910. We followed the Frenchman's name for it, "artificial

silk," and looked upon it as a novelty, almost a joke.

In 1892 two Englishmen named Cross and Bevan had taken out a patent for the extrusion of regenerated cellulose, of which the basic raw material is wood pulp. Their product became known as viscose rayon and today accounts for about two thirds of the world's production. The Germans also improved on a Swiss system of making acetate material and introduced it into this country in 1924 as the Glanzstoff Bemberg system. An American Bemberg Company was formed in 1926, and from this we get our trade name of Bemberg. The first truly American contribution to man-made fibers was nylon, made by the Du Pont Company in 1938. Since then, there have been aralac, orlon, dacron, fiberglas, lanital, saran and a host of others.

Almost every week we hear of new names, mostly trade names and words coined by the manufacturers, but it would serve no purpose here to go into the chemistry of their processes—even if I were competent to do so. Suffice it to say that innovations in man-made fibers will continue until the end of time. There will be warmer fabrics and cooler fabrics, prettier fabrics and longer-lasting fabrics—none of which any of us can envision now.

It was not until after World War I that any appreciable attempt was made to spin and weave man-made fiber into cloth. Since, as I said, it was then commonly referred to as "artificial silk," it was natural for the woven cloth to be sent to the silk dyers in the Paterson area for processing, and particularly for dyeing.

Silk was always expensive, and a custom had grown up with silk processors through which the processor assumed full liability to the bailor for any loss or damage occurring to the property. However, this custom has never been reduced to any written instrument, and when loss occurs, one finds such a diversity of opinion, not only between the parties directly concerned, but in the industry as a whole, that the original agreement becomes lost. The custom still exists, but it is still so clouded that the best that can be said for it is that the bailee does effect, and pay for, insurance on the bailor's goods. Some bailees effect insurance against "all physical loss or damage from any external cause," while others simply insure against specified perils.

In the early twenties, new fibers were being woven by the cotton mills down south. The whole country was enamored of the new fibers. This, plus other postwar conditions, contributed to a very serious recession in the South. The cotton bleacheries, of course, were adversely affected, and they had been with us long before the silk processor. The bleacheries concluded that the new fibers were just as analogous to cotton as they were to silk, and decided to "go after" the processing of it. The result is that today, probably more fabric of man-made fibers is processed in cotton bleacheries than is processed in silk- and rayon-dyeing establishments.

The reason I bring this to your attention is because of the fact that the cotton bleacheries also have had a trade custom in respect to bailors' goods. Their custom is *not* to effect insurance of any kind and not to be responsible for any loss or damage, except for their statutory or common-law liability as a bailee. This arrangement is reduced to a writing known as a "price quotation."

Property-Loss Claims

Most property-loss claims fall into two categories: total loss by theft or disaster, such as fire, and partial loss, which can be the result of either. In the instance where the property is a total loss, there is little to be done but to assess the damages in accordance with the valuation clauses of the policy, presupposing that all terms and conditions of the insurance policy have been complied with, and the cause of the loss is within the purview of the coverage.

Partial loss, however, confronts us with a more complex situation. First, all inland marine policies have, or should have, a "sue and labor" clause, which enjoins the assured not to abandon the property, but to do all things necessary to save and preserve the property so it will not become a total loss. The application and operation of the "sue and labor" clause is a legal problem which I, as a layman, will not presume to discuss. However, as an adjuster I might with propriety discuss some aspects of its practical application, particularly as it relates to textiles.

In the textile field, we have partial losses by theft and disaster where the marketability of the remaining or undamaged portions is lessened by the loss or destruction of the portions directly concerned. This is known as "consequential loss." Such losses can readily occur in the dress or clothing business where a size or color

range is broken up, or where an entire suit is broken up by the loss of, or damage to, one of its components. Such losses may also occur in the piece-goods business where the yarn is dyed before it is woven. This is particularly true in the woolen, neckwear and umbrella-cloth industries.

By far, most of the partial losses in textiles are due to water damage, particularly in piece goods. Most of the fabric in use today is made of either cotton or man-made fibers—or a combination of both—and practically all of it is woven by the cotton mills.

Thus, if the piece goods are water damaged at a cotton bleachery, the owner is on his own, through his own insurance company, if he has insurance. Conversely, if the goods have been damaged at a silk-and rayon-dyeing establishment, it usually will be found that the dyer has effected insurance. Hence, an adjuster might find himself doing business directly with the bailor as representative of the bailor's own insurer, or doing business indirectly with him through the bailee's policy covering customers' goods.

In either event, it is the duty of the assured, whoever he might be, to save and preserve the property from further loss. If the assured owner of the property is at one place, and the property itself at a distant place, with no insurance other than that effected by the owner, the owner might have a difficult problem.

Insurance Adjuster's Role

This is where the insurance adjuster steps in with his practical handling. So much can be done by the adjuster with the cooperation of the assured that the latter is relieved of many time-consuming details.

A competent adjuster will certainly not ask an owner-bailor to travel hundreds of miles to inspect fire-damaged goods when the adjuster himself can determine that the goods are beyond use for the particular trade in which the owner is engaged.

In the majority of cases, however, the goods are only partially damaged, either by smoke or water. Here again, with the consent and cooperation of the owner, an adjuster can do many things to relieve the owner of many details necessary for the saving and preserving of the property, especially if the property is located at a distant point.

In the instance of piece goods which have been partially damaged while in process, the most common type of damage is from leaking water pipes such as the sprinkler system. This water carries with it foreign substances, such as rust. It also washes down from the ceiling, rafters and other places, with accumulated mill dirt, all of which falls upon the goods. What rehabilitation is to be done depends upon the stage of processing the goods have reached. With goods defiled, normal processing can rarely be continued. It is usually necessary to go back to a previous stage. How far back depends upon the quality of the goods, the colors and their intended end use. It is impossible for me to enumerate here all or many of the mechanics of this operation, but by corrective measures the goods can be taken back to a previous state and the operations resumed from that point forward.

It is necessary for the adjuster to work in close cooperation with the processor, to be present while tests are made, even at times on a trial-and-error basis, and to offer suggestions. When all else fails and it is found that the effects of the foreign substances cannot be removed, there still remains the opportunity of putting the goods into darker colors which many times screens the stains. At times it is necessary to dye the goods into colors that are not in vogue. Here we run into a merchandising problem, but at least the goods are saved and turned out as a finished product. As such, they are then available to the owner for his examination, leading either to his rejection or acceptance of them. If there is a merchandising problem involved, the adjuster will always face up to the equities of the situation.

Next we come to the instance of raw silk, cotton or synthetic goods in the gray state, which means the state in which the cloth comes off the looms. Here an altogether different situation obtains. It will be found that the owner has been accumulating his raw or gray stock for future processing. You will understand that these goods are contracted for many months in advance, and after the passing of title they may be left at the vendor's premises or sent to a dyeing establishment, to be accumulated pending the ensuing season.

The owner has no immediate market for these goods. Hence, should the goods become partially damaged, by water for example, the owner immediately is faced not only with the obligation of saving and preserving them, but with the dilemma of merchandising out-of-season goods.

With the consent of the owner, the assured can arrange to have the goods sent

to a dyer, or if the property is already at the premises of a dyer, to have the dyer scour, or what is called "boil off," the goods. This, fundamentally, is nothing more than the removal of the sizing, and other impurities in the goods.

The question naturally arises as to why the cloth is to be boiled off. Why not simply dry the goods and let it go at that? Many inexperienced adjusters have done simply that, with the result that they have permanently damaged goods on their hands. The reasons for boiling off the goods are several, not the least of which is the fact that prior to weaving, the yarn which is to be used in the warp (which are the longitudinal strands) is treated with a chemical sizing of various resins and gums. The reason for this treatment is to give the yarn strength and a smooth surface, in order that it may withstand the abuses and tensions of weaving. Should the goods become wet and this size not immediately boiled out of the cloth, mildew will quickly develop. Should the cloth become mildewed, it is greatly weakened and permanently stained. It is therefore necessary, in many instances when large quantities of cloth are involved, to keep the cloth in a wet condition until the boil-off process can be completed. In my experiences through years of insurance adjusting, I have at times resorted to the use of ice or hose lines to keep the goods wet.

This boiling off is an ordinary step in the processing of cloth in order to make the fibers receptive to, and permit penetration of, the dyes. So far as the dyestuffs are concerned, there must be an affinity of kind for kind, that is, dyes intended for rayon fibers have no affinity for acetate fibers, or vice versa. This is the reason why cloth woven of different yarns can be dyed into more than one color in the same tub. So you can see that boiling off is necessary, even barring any disaster, and if the adjuster will immediately arrange to have this done, the chances are favorable for the turning out of perfect goods.

To become technical for a moment, I should like to point out that acetate is not a regenerated cellulose such as rayon yarn, but rather an ester of cellulose, namely, cellulose-acetate. It has different physical and chemical properties from other rayons, especially in its reaction to dyes. It is not affected by most dyes and a whole new set of dyes had to be developed for it. However, it has a peculiar characteristic: Should the fibers become wet in an uncontrolled manner, a saponification or an osmosis will occur to the extent that the fibers will then have an affinity for rayon dyes. Should the cloth become saturated, it can still be dyed into a merchantable piece of goods. However, should the goods become wet only in spots and then permitted to dry out, the yarn in these dried-out spots will have changed character, and the entire piece of cloth will have become a constructive total loss. The boiloff I speak of will wet out the goods evenly, and thus obviate this danger. The goods can then be dried and put back into stock, awaiting the owner's future instructions.

There are many more facets to the practical application of insurance adjusting, but they are too numerous to be detailed here. In closing, I should like to say that the adjuster representing our large and trustworthy insurance business must perforce not only be a practical man, but he also must be an honest man. He must not only be honest with his employers, the insurance companies, but he must also be honest with himself. Hence, he must be honest in his dealing with the public. Millions of dollars are paid out every year by our insurance companies without rancor, and millions are saved for the companies by the activities of the adjuster, whose competence and integrity have earned the respect and confidence of the merchants and artisans with whom he must constantly deal.

[The End]

A rise in the death rate in 1957 among ordinary life insurance policyholders in the United States caused a reversal of the downward trend that had prevailed over the previous five years, according to the Institute of Life Insurance. The 1957 rate of 607.3 per 100,000 policyholders was 4.4 per cent higher than the 1956 rate.

Modern Trends of Business Insurance

By M. D. GRIFFITH

The author is senior vice president, New York Board of Trade, Inc. He delivered this address before the Brooklyn Law School Third Annual Insurance Forum, March 21.

FROM our constantly growing, working and changing economy there emerge some clear observations.

I believe it is a sound hypothesis upon which to begin to state that we are concerned about present business conditions—call the situation a leveling-off, recession, depression or what you may. For a variety of reasons—many of them questionable—remedies are being offered in profusion. Generally speaking, businessmen in the United States, and especially those whose interests have been associated with substantially larger business, are not greatly surprised at what is happening now. For many months they have observed accumulating evidence. Over a long period, the financial press has reported one consistent story: increased volumes and lower margins of profit. To offset these trends, business executives and administrators have made intensified efforts to promote efficiency to the end of widening the margin between the income and the expense of operations.

Executives have availed themselves of the broader prospectives, the penetrating techniques and the new knowledge taught by the schools of business administration associated with universities throughout the country. The descent of business representatives on the graduating classes is common knowledge. The graduates are grounded in the newer scientific discoveries which are being developed into more efficient equipment.

For many months, directors, executive committees and staff conferences have been concerned with shrinking profits and even substantial losses. Rarely has there been a report of increased earnings or extra dividends or the cutting of a stock melon.

Lest I be misunderstood, may I say plainly that I think the present condition is temporary? I continue to feel that our political philosophy is sound and the economy serving our society will emerge out of the present adversity and will continue to serve usefully an even greater future.

I am using the background of present business conditions for certain observations about insurance. Expressed tersely, insurance has proven to be *"good when things are bad."*

Insurance-wise, the figures for 1957 are still being compiled. Shortly, we shall have authoritative published reports. Some few of us have had the opportunity to peek at source material. During this period, which I have suggested is one of great business concern and intensified efforts to prune costs, the insurance industry in the United States has made gains. While some of this is because of inflationary processes, there is no economist reporting increased valuations or price rises in the same ratio as the gains by the insurance industry.

Using, for example, fire and casualty business, during a 25-year period through 1956, the assets of the companies increased from $4½ billion to $23 billion; policyholders' surplus increased from $1¾ billion to over $9½ billion. There is a strong indication now that fire and casualty during 1957 went up between 7 per cent and 8 per cent in assets, which is as high a percentage of increase as occurred in years prior to 1956. With intensified efforts to use the pruning axe, fire and casualty business made greater gains than in the many previous years. This was because of increased services and better protection. It was not because of rise in prices nor because of depreciation of the purchasing power of currency.

Emerging is the absence of emotionalism by the American businessman in cloaking

himself with the protection of insurance. It is a wholly intellectual approach and completely devoid of hysteria.

The insurance industry as a whole is well known for its strength of character and its strength of resources. Insurance stands so high in public opinion that deviation or wrongdoing—as may occur in any human institution—causes profound shock and is featured in the newspapers that specialize in such reporting. Such rare lapses have not impugned the integrity of the industry as a whole. We insure everything of value, even our bank deposits, but I have never heard of anyone insuring his insurance.

Another observation might be made, as to the larger role played by insurance in the economy of a private-enterprise system. One of the newer and enlarged functions of insurance is the appearance of the insurance industry at the employment gate. Contracts negotiated between union and management contain more insurance clauses as integral parts and conditions.

The executive, skilled in management, was accustomed not only to insuring the factory, machines and equipment against loss from theft and from fire, windstorms, and other damage, but also insuring his company's trucks against collision, property damage, public liability, and other potential losses. The initials "CIF," meaning "cost, insurance, and freight" were as familiar to him as C. O. D. (cash on delivery). He knew that "CIF" included insurance on goods in transit and on ships at sea, hulls and cargoes, passengers and crew. He insured employees against workmen's accidents and hazards, and he insured their jobs against periods of unemployment. He gave performance bonds on fulfilling contracts, and he asked for such bonds on those serving him. He got loans from his bank on insured bills of lading.

For sources of capital, he employed the services of the insurance company to get mortgage money for buildings and equipment. Within recent years, he found those companies and others holding his bonds and his preferred and common stock.

A relatively newer trend is the increasingly important place being taken by insurance in labor relations which have frequently increased the labor costs. These are matters of serious moment in our expanding economy.

The word "insurance" is sometimes used as a cloak to cover acts not related to the science of underwriting. Some of these are of dubious benefit. A state law which furnishes compensation for accidents caused by uninsured drivers, those who hit and run, or through stolen cars may be socially desirable. The law may find someone to pay, but it is basically not "insurance," as we interpret that word. It might be called a "state umbrella" as distinguished from motor vehicle liability insurance as we know it.

I do not regard a bill currently before the legislature to empower counties throughout New York State to play political football with performance bonds as sound insurance, nor do I regard the supplemental payments of unemployment insurance in the automotive industry as sound insurance.

These problems are only presented, not solved. To illustrate, the latest contracts between the UAW and the automobile industry involved a substantial supplement to unemployment insurance. Is it mere coincidence that the *New York Times* recently reported "auto inventories near record high," despite sharp reduction cutbacks? A skeptic observes that the extra length of the new-model cars is used to conceal the hidden costs of fringe benefit to labor, which is one reason the public is not rushing in to purchase. I am only asking the question and am not attempting to supply the answer. Nor am I laying this orphan child on the doorsteps of the stock or mutual insurance companies which do not write this class of insurance. I am only sticking to my subject of "modern trends of business insurance."

Another new trend, capable of great usefulness, is to newer and more modern policies to cover assumed obligations. I have reference to life insurance, accident and health policies in connection with installment buying, mortgages and savings bank accounts.

The young couple buying a home to raise a family has added roof protection. In the same manner, there would be more security in the purchase of home appliances, if it were known that in case of death or sickness there would not be an immediate action to recover the goods purchased and in use. The same principle of thrift is applied when life insurance is coupled with the savings account.

For many years, certain kinds of insurance have been regarded as prerequisites in the purchase of automobiles on an installment basis. The finance company employs insurance coverage to protect its investment against the usual hazards of driving. This is a perfectly sound step in the direction of

insuring credit. Its extension to other lines of credit obligations is equally sound and reasonable.

Another modern trend, in these days of high specialization, is to insurance which indemnifies a corporation against loss of the investment which it has in some of its employees and officers.

In conclusion, the American businessman faces these new trends not with emotionalism nor crocodile tears, but as a calculated risk. As we break our way through into the unknown future, I hope we can keep refined our concept of insurance. I hope we will not yield and apply the name "insurance" to generalized social philosophies and political propaganda whose application bears no resemblance to the sound rules of underwriting.

We cannot pass laws insuring protection. No act of Congress, in itself, is national defense. It only makes possible the organization of our strength to defend ourselves. Nor can we pass laws which of themselves will afford economic protection to people. Like our national defense, our national security depends upon organization, great effort, sacrifice and the conserving of our economic strength. To that end, business has a sincere interest in safeguarding against use of some modern trends of miscalled insurance to the disadvantage of our country. **[The End]**

A REPORT TO THE READER

Continued from page 292

To qualify under the rule of this case for deferred tax treatment, the following conditions apparently must exist:

(1) Commissions must be, in part, consideration for services to be performed in the future.

(2) There must not have been a change in the established method of accounting for commissions.

(3) The arrangement for placing commissions in escrow may not be voluntary on the part of the agency but must, apparently, be at the insistence of the insurance company for its protection.

Legislation, such as was repealed after enactment in the 1954 Internal Revenue Code, is needed to remove the inequities resulting from the Supreme Court decision in the *Brown* case.

In view of the trend toward premium financing of term business, a similar problem faces agencies. The case of *Keasbey & Mattison Company v. U. S.*, 44-1 USTC ¶ 9189, 141 F. (2d) 163, has renewed importance because of the analogy it presents and the fact that it involved the Bancredit Corporation form of finance contract. This decision will be dealt with at some length.

Under the contract between the plaintiff (a manufacturing and sales company) and the finance company, the latter agreed to discount, for applicators, notes of homeowning purchasers of the plaintiff's products, for which service the finance company was to make a charge of 7 per cent of the amount of the notes so discounted. Payment of the notes by the makers was to be arranged on an installment basis. Five of the 7 per cent charge made by the finance company served as compensation for its financing services and the balance (2 per cent) was to be placed in a reserve fund by the finance company to liquidate possible losses from uncollectible notes. The contract authorized the finance company to charge against the reserve fund any discounted notes of home owners delinquent for 60 days or more. It further provided that whenever the total reserve fund should exceed 10 per cent of the unpaid balance of the outstanding discounted notes, such excess should be paid to the plaintiff at its option on January 3 of each year of the life of the contract and that, upon termination of the agreement and when all installment notes discounted thereunder had been liquidated in full and all sums due the finance company had been paid, any balance remaining in the reserve fund was to be paid to the plaintiff. The contract also contained an express assumption of liability on the part of the plaintiff to the finance company for unpaid notes, in addition to the protection afforded by the reserve fund, up to 10 per cent of the aggregate amount of notes discounted by the finance company under the agreement.

At no time during the taxable year did the amount in the reserve fund exceed 10 per cent of the unpaid notes discounted by the finance company under the agreement. Nor was any part of the reserve fund either paid or payable to the plaintiff during the taxable year. On the other hand, the aggregate amount of the delinquent notes was always less than the amount of the reserve fund during the taxable year, so that noth-

ing was paid, nor did anything become payable, by the plaintiff to the finance company during the taxable year on account of the plaintiff's assumption of additional liability for delinquent or unpaid notes.

The plaintiff, which kept its books on the accrual basis, did not show as an asset, and therefore did not reflect in its income, any part of the reserve for bad debts set upon the books of the finance company under the contract. Neither did the plaintiff include among its liabilities its possible liability to the finance company for delinquent or unpaid notes in excess of the reserve fund up to 10 per cent of the aggregate amount of the notes discounted by the finance company.

The commissioner held that the reserve fund for delinquent notes shown by the books of the finance company ($25,812.56 after a charge thereto of $3,980.23 for currently unpaid notes) was an asset of the plaintiff accruable for the taxable year in question and should have been so accounted for, but that the plaintiff's additional liability on account of the notes discounted by the finance company during the taxable year (namely, 10 per cent of $503,592.21 less the reserve fund) was contingent and therefore not accruable. Accordingly, the commissioner recast the plaintiff's balance sheet for the taxable year and thereupon determined the deficiency which led to the assessment and tax payment giving rise to the suit involved in this appeal. The court below upheld the commissioner's determination and entered judgment for the defendant.

Thus, the court below approved and followed the commissioner's rulings, namely, (1) that the reserve fund on the books of the finance company was an accruable asset of the plaintiff for the taxable year and should have been so reflected in its return of income and (2) that no liability rested upon the plaintiff on account of delinquent or unpaid notes over and above the reserve fund, which was accruable for the taxable year.

The circuit court reserved, saying:

"It is the 'right to receive and not the actual receipt' of an amount which determines its accruability. But the right to receive must have become fixed before the right can be said to have accrued. *Spring City Foundry Co. v. Commissioner*, 292 U. S. 182, 184, 185, 54 S. Ct. 644, 78 L. Ed. 1200. Consequently, until the right to an amount becomes accruable through the fixation of the right to receive, the taxpayer is under no obligation to return it as income. Otherwise he would be required to pay a tax on income which he might never have a right to receive. See *North American Oil Consolidated v. Burnet*, 286 U. S. 417, 423, 52 S. Ct. 613, 76 L. Ed. 1197. . . .

"Applying the foregoing principles to the facts of the instant case, it follows that no part of the reserve fund was accruable as an asset to the plaintiff during the taxable year. Certainly nothing was payable to the plaintiff by way of reserve excess, for there was none. At no time was the reserve much more than half the amount of ten per cent of the notes discounted by the Finance Company (the amount of reserve necessary before there could be any excess payable to the plaintiff). And, as to what was actually in the reserve, the plaintiff's right thereto was subject to the payment therefrom of all notes, discounted by the Finance Company, which should become delinquent for a period of sixty days or more, and all charges due the Finance Company. Whether the plaintiff would ever acquire a fixed right to receive anything from the reserve fund was contingent and unascertainable throughout the taxable year."

It would appear that these cases form a basis in law and fact for working out similar arrangements whereby the commissions on term business would remain more or less in a "vacuum" pending the runoff of the policy period. So long as real conditions and restrictions are imposed on the use and enjoyment of such commissions, tax deferral should be possible until release of the commissions from the escrow or reserve account.

A somewhat different situation is presented in connection with so-called installment-premium plans. Basically, there are two major plans now in use. One involves the installment-premium-payment endorsement, whereby the agent collects the premium annually and deducts therefrom his pro-rata share of the commission. This arrangement is essentially the same as writing three-or five-year term business, but the commission is deferred until receipt of the installment premium. The second form is the annual-renewal-plan endorsement, which plan involves a one-year policy subject to renewal so that each renewal is, in effect, the issuance of a new policy. Similarly, the annual premium is collected and the commission withheld by the agent. In neither case should there be any serious question of the right to defer reporting commissions until actual receipt, even though the agency is on the accrual basis for tax purposes, since the right thereto is contingent upon payment of the premium. This is not the same, how-

ever, as the accrual of a commission by an accrual-basis agent in dealing with year-end business included in the account current but which is not collected until after the end of the year. Unless collection is extremely doubtful, it would be necessary to accrue this commission in the year the business is produced, even though receipt of the premium is postponed until after the taxable year. A cash-basis agent would report the commission only in the year of actual receipt, however.

How to handle unexpired installment or annual renewal business upon termination of an agency-company agreement is one of the difficult problems created by this type of underwriting. After termination of the agency contract, under most state laws the agent may be precluded from further representing the insurance company, even to the point of being unable to issue periodic endorsements, to collect subsequent premiums and to further service the business to the expiration of the term originally entered into with the insured. Also, even though the agent no longer represents the company as a result of cancellation of the contract, the insured is still entitled to the benefits of the lower installment premiums for the remaining three- or five-year term. This right further complicates the problem of the initiating agent.

State Rulings and Enactments

There have been at least four recent solutions by various states to meet the problem which confronts the agents in these cases. North Carolina, Tennessee and New Mexico have recognized the problem by rulings of the Insurance Commissioner. Florida enacted an amendment to its Solicitors' and Agents' Qualification Act, effective October 1, 1953, which is the first specific attempt to deal with the problem by legislative enactment.

The Florida enactment, contained in Chapter 627.90 of the Florida Statutes, is entitled "Insurers prohibited from issuing contracts except through agents." The first sentence of this section prohibits insurers from issuing contracts except through regularly licensed insurance agents. The second sentence provides an important exception in the following words:

"Provided, however, that agents may counter-sign all certificates or endorsements necessary to continue the coverage to the expiration date, including renewal option periods, even though said agent may have, subsequent to the issuance of the original certificates, endorsements or policies, terminated his connection with the issuing insurer."

The Tennessee Commissioner's ruling, dated May 22, 1953, attempts to solve the problem by applying the following procedure:

"If and when a company withdraws from an agency, and the contract between the company and the agency or the producer provides that the producer shall retain ownership of the business, such producer may transfer the business as written under the annual renewal or installment plans to another company of his choice, and for which he must be licensed, by rewriting such business on the anniversary date next following the withdrawal of the company on the basis of 78 percent of the annual rate for the balance of the term of the contract. Such procedure, however, must be fully agreed upon in writing by the ceding company, the assuming company and the agent or agency involved.

"An agent or an agency shall not rewrite the business in another company, as set out above, unless he has the approval, in writing of the Commissioner of Insurance and Banking."

The ruling of the New Mexico Superintendent of Insurance, dated October 1, 1953, follows the Tennessee ruling almost word for word.

The North Carolina Commissioner's ruling, effective June 2, 1953, was the result of a conference which the Commissioner held in January, 1953, with representatives of agents and companies. Its purpose is to protect a policyholder when a company withdraws from an agency while the installment or annual renewal plan is in effect. The ruling states:

"Where, under the terms of the agency contract expirations belong to the agent, the company shall give the agent the option

"(a) of continuing with a limited license for the purpose of collecting the premium and servicing the risk such as renewals, collections, etc. or

"(b) reinsuring to expiration with companies remaining in the agency."

Insofar as is known at the present time, these are the only formal pronouncements of the various states to meet the problem confronting the agent where unexpired installment and annual renewal business is still on the books at the time of termination of an agency. Other states may also have met the problem, formally or informally.

[The End]

The Legal Aspects of Weather

The ability to modify weather conditions can be of enormous importance to our nation. Consequently, the Advisory Committee on Weather Control was established by act of Congress in 1953. The committee's activities dealt primarily with an evaluation of the effectiveness of cloud seeding and the collection of all possible information about the physical reactions involved.

As might be suspected, legal questions can arise from the practice of weather modification. For example: Is a company (which is engaged in weather modification) liable for an excessive amount of rainfall which damages someone's property? An analysis of the legal situation was made by Jack C. Oppenheimer and, in part, formed the basis for the committee's findings and recommendations, as published in its final report. Mr. Oppenheimer, executive secretary of the committee, is a member of the Washington, D. C. bar. His report follows in full text.

THIS is a statement of the legal situation which together with the scientific and other findings of the Advisory Committee on Weather Control underlie the consideration and formulation of legislative recommendations for future Federal Government research and regulatory activities in the field of weather modification. The assistance and advice of William A. W. Krebs, Jr., vice president of Arthur D. Little, Inc., and legal consultant to the Advisory Committee, in helping to collect and analyze initially the legal materials involved, is gratefully acknowledged. Also, I should like to express appreciation to William J. Hoff, General Counsel of the National Science Foundation, for reviewing the draft of this paper. The sole responsibility for the facts, analysis, and method of discussion of the statutory and case law is assumed by the writer.

Constitutional Bases for Federal and State Regulatory Legislation

Although the precise question has not been ruled on by the courts, it is clear that the Federal Government has constitutional power to regulate those who engage in activities designed to modify or control the weather. The principal constitutional bases for Federal regulation of such activities are the commerce and war powers. The modification of weather by man may have substantial effects upon interstate commerce and the national defense.[1]

Since the Federal Government under the commerce clause has the power to regulate intrastate commerce where it affects interstate commerce, it can occupy all or any part of the field of regulation, both interstate and intrastate, and thus, if it chooses, exclude the States.[2] This exclusion could also be made effective under the war powers. However, the Federal Government will not have occupied any portion of the regulatory field until one of the following events occurs:

(1) It has been established by the courts that weather modification is a national problem requiring a single unified plan of regulation within the doctrine discussed in *Cooley v. Board of Wardens*, 12 How. 299 (U. S. 1851); or

(2) The Congress goes beyond authorization of study and evaluation and the mere assertion of interest in experimentation and development expressed in the Committee's existing legislative authority (see Statement of Purpose and Policy and sec. 3 of Public Law 256, 83d Cong., 67 Stat. 559, as amended, 15 U. S. C., sec. 311 note).

The police power of the States and regulatory legislation enacted pursuant to it will be effective until weather modification (*a*) becomes a problem of national magnitude necessitating uniform Federal treatment;

[1] The leading cases are *U. S. v. Darby*, 312 U. S. 100 (1941) and *Wickard v. Philburn*, 317 U. S. 111 (1942).

[2] *International Shoe Co. v. Pinkus*, 278 U. S. 261 (1928).

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(*b*) the Congress has broken its silence regarding Federal regulation of such activities; or (*c*) Federal regulatory authority is required to implement or protect the integrity of Federal programs of research, experimentation, development and evaluation.

If and when the Congress enacts regulatory legislation, the issue of whether the Federal regulations are fully exclusive, partially exclusive, or merely concurrent with those of the States will be a matter of statutory interpretation for the courts.[3] Any State regulation which is found to conflict with any Federal regulation enacted in the future will be an unconstitutional interference with Federal control and a burden on interstate commerce.[4] And the various States which have enacted and administered regulations in the field of weather modification prior to the enactment of any Federal regulatory legislation, cannot exclude such future Federal regulation.[5]

In sum, the comprehensiveness and effectiveness of both future Federal and present and future State weather control laws will be dependent upon the breadth and character of further Federal legislation. The expressed or implied intent of the Congress to preempt the field of weather modification regulation or exercise measures of exclusive, partially exclusive or concurrent control with respect to the States will, together with the character of the scientific and economic developments in weather modification, largely determine the political pattern of any regulatory controls.

Federal Legislation

Within two years after Langmuir's and Schaefer's historic experiment in 1946 of seeding clouds with dry ice, and the beginning of governmental research, a number of commercial cloud seeding companies were organized. Exorbitant claims by some cloud seeding organizations and scientists led to sharp differences of opinion as to the economic benefits of seeding activities. Various aspects of this controversy came to the attention of the Congress. Between 1951 and 1953 congressional hearings on several bills, introduced by members of both parties, revealed that farmers, ranchers, electric utilities, municipalities, and other water users were paying 2 cents to 20 cents per acre, and annually were spending from $3 to $5 million on weather modification activities covering approximately 10 percent of the land area of the Nation. In recent years the area seeded has been slightly less on an annual basis. The legislative hearings showed that there was a necessity for impartial evaluation of these extensive weather modification operations to ascertain if they were producing favorable or unfavorable results. There were no existing private or public agencies willing or able to perform this task. The existing agencies were primarily concerned with weather forecasting, pure and basic research in cloud physics or commercial cloud seeding.

As a result of this lengthy congressional consideration, the Advisory Committee on Weather Control was established by an act of August 13, 1953. On July 9, 1956, the Committee's life was extended with the same bipartisan support for an additional 2 years because the Advisory Committee had been functioning, actually, for a period of only about a year and a half, due to delay in obtaining initial appropriations and difficulty in assembling a competent scientific staff for this unique assignment.[6]

The Committee is composed of the Secretaries of the Departments of Agriculture, Commerce, Defense, Interior, and Health, Education, and Welfare, the Director of the National Science Foundation, and five private members appointed by the President, by and with the advice and consent of the Senate, from the fields of science, agriculture, and business. The chairman and vice chairman were appointed by the President.

In accordance with the Committee's legislative directive, it has been conducting a

[3] *Southern Pacific Co. v. Arizona*, 325 U. S. 761 (1945).

[4] *Cloverleaf Butter Co. v. Patterson*, 315 U. S. 148 (1942).

[5] *U. S. v. Wrightwood Dairy Co.*, 315 U. S. 110 (1942).

[6] Advisory Committee on Weather Control, 67 Stat. 559 (1953) as amended by 70 Stat. 509 (1956), 15 U. S. C. 311 note. For legislative history see joint hearings before Senate Subcommittees of the Committees on Interior and Insular Affairs, Interstate and Foreign Commerce, and Agriculture and Forestry, 82d Cong., 1st sess., on S. 5, 222 and 798 (1951); S. Rept. 306 and H. Rept. 1022 to accompany S. 285, 83d Cong., 1st sess. (1953); and S. Rept. 1866 and H. Rept. 2424 to accompany S. 2913, 84th Cong., 2d sess. (1956).

study and evaluation of weather modification or control activities for the purpose of determining the extent to which the United States Government should experiment with, engage in, or regulate such activities. The Committee is required to submit reports on its findings and recommendations to the President from time to time, for submission to the Congress. At the earliest possible moment, and not later than June 30, 1958, it must submit a final report and a report on the advisability of the Federal Government's regulating, by means of licenses or otherwise, those who attempt to engage in activities designed to modify or control the weather. The date for this final report was changed to December 31, 1957, by the Supplemental Appropriation Act for fiscal year 1958.

The statement of purpose and policy of the Advisory Committee's authorizing legislation recognizes the interstate, general welfare, and defense implications of weather modification activities and the national and international concern with them. It declares it to be the policy of the Congress for the committee:

" . . . to effect the maximum benefit which may result from experiments and operations designed to modify and control weather, to correlate and evaluate the information derived from such activity and to cooperate with the several States and the duly authorized officials thereof with respect to such activity, all to the end of encouraging the intelligent experimentation and the beneficial development of weather modification and control, preventing its harmful and indiscriminate exercise, and fostering sound economic conditions in the public interest."

The Committee may secure information from any executive or independent agency of the Federal Government and it may, for the purposes of carrying out the provisions of the act, hold hearings, take testimony and administer oaths or affirmations to witnesses appearing before it. The Committee, by means of regulation, subpena or otherwise, may obtain information not obtainable from any Federal agency that is necessary or appropriate to carry out the provisions of the act. Information deemed confidential by the Committee for national security or other reasons, or with respect to which confidential treatment is requested by the informant, shall not be published or disclosed unless the Committee determines that withholding such information is contrary to the purposes of the act. The Committee requires all persons or organizations conducting weather modification operations or experiments to report their activities on official forms provided for the purpose. The substantial majority of those reporting their weather modification operations have requested confidential treatment of the data furnished. The informants previously have been advised that, although disclosure of information obtained in confidence is not anticipated, if release appears desirable the Committee will first consult with the informants.

State Laws and Activities

Until enactment in August 1953, of the Federal law which established the Advisory Committee, only a few States had passed laws in the field of weather modification or control. However, interest was sufficiently widespread to prompt the Council of State Governments to introduce a suggested act in its program of suggested State legislation for 1953.

By the end of 1954, 10 States—Arizona, California, Colorado, Massachusetts, Nevada, Oregon, South Dakota, Utah, Wisconsin, and Wyoming—had provided for regulation of weather modification activities in some degree. Within the last 2 years, Louisiana, Nebraska, and Washington were added to this list. Three other States—New Hampshire, New Mexico, and Oklahoma—have taken notice of State interests in the field by collateral legislative action. Further legislation may result from the interest being shown by the legislatures or State agencies in Connecticut, Florida,[7] Illinois, Iowa, Kansas, Missouri, New Jersey, New York, and South Carolina.

Five States—Colorado, Louisiana, Nebraska, South Dakota, and Wyoming—explicitly claim sovereign rights to the moisture in the clouds and atmosphere within their State boundaries. Five of the total of 16 States that have adopted laws in this field—California, Massachusetts, New Hampshire, Washington, and Wyoming—provide explicit legislative authority for research and experimentation by State agencies or universities. As of the present, there are existing or emerging State-sponsored research programs in Arizona, California, Florida, Oregon, South Dakota, Texas, and Utah.

[7] Florida's Regulatory Statute (Ch. 57-128, Senate Bill No. 143, 1957), became law recently without Governor's approval, and came to the attention of the writer just prior to the publication of this report.

Of the 13 States that regulate weather modification activities, 10 require licensing. They are Arizona, California, Colorado, Louisiana, Massachusetts, Nebraska, Oregon, South Dakota, Washington, and Wyoming. Three States—Nevada, Utah, and Wisconsin—provide for certain regulations but do not require licensing. The Nevada Legislature in 1955 specifically repealed its 1953 regulatory act and authorized the State and the counties to conduct actual weather modification operations and to issue regulations. Most of the 13 States require that prior notice of operations be given to State authorities and/or the general public in the area to be affected. It appears that 8 States—Arizona, Louisiana, Massachusetts, Nebraska, Oregon, South Dakota, Washington, and Wyoming—regulate the methods or conditions of operation. Arizona regulates the manufacture, sale, lease, and advertisement of weather modification equipment. Many of the State statutes express in one form or another the requirement or desirability of cooperating with the Federal Government and other States in weather modification activities.

Reports by the operators and evaluation by the State authorities are provided for in a number of regulatory States. All of these States require certain technical qualifications in order to be granted a license to operate. Financial ability, through insurance or otherwise, to respond in damages for harm done, is expressly or impliedly required in most of the regulatory States. In a majority of them, fees for annual licenses range from $25 to $100. License revocation, fines ranging from $250 to $1,000, and imprisonment for not more than one year are the usual penalties for noncompliance with the State laws and regulations.

One of the problems in weather modification has been the financing of cloud seeding activities other than by voluntary subscription. Study of the specific State statutes on weather modification and inquiry of all of the States reveals the following: Nebraska, Nevada, South Dakota, and Utah authorize explicitly their local governmental entities or specially created weather control districts to spend general funds or revenues raised by special taxes for weather modification operations or research. Section 53062 of the California Government Code provides that any county, city, district, authority or other public corporation or agency which has the authority to produce, conserve, control or supply water for beneficial purposes shall have the power to engage in practices designed to produce, induce, increase or control rainfall or other precipitation for the general benefit of the territory within it. Also, the California Legislature temporarily granted the Riverside County Flood Control and Water Conservation District special authority to levy and collect a tax to finance a program of artificial nucleation for the purpose of increasing and controlling rain within or partially within the district.

Most of the State officials queried believed that the absence of explicit authority and lack of actual experience or judicial precedent rendered improbable legal authority for their States or political subdivisions to appropriate general funds or levy taxes to finance weather modification activities. A few of the State officials cited the general authority of some of their cities, counties, and irrigation and conservation districts to do any and all lawful acts necessary to provide safe and sufficient water supplies as adequate legislative authority for the raising and expenditure of funds for purposes of weather modification.

The administrative experience of the States under their regulatory statutes appears to have been limited mainly to the receipt of applications for licenses and the issuance of such licenses to conduct weather modification operations. The States have small amounts of money and personnel to administer and enforce their regulations, and their activities concerning weather modification are conducted usually as an incident to other conservation, water resources or agricultural programs. Inquiry of the responsible State officials reveals their opinion to be that there are no particular problems of a scientific, organizational, safety, or legal nature which might form the basis for recommended changes in State legislation, regulations or programs. The most comprehensive and suggestive document from which to gather State administrative experience is an office report of the State of California, Department of Water Resources, Division of Resources Planning, entitled "Report on Weather Modification Operations in California, July 1952-June 1956." This report describes procedures, regulations and forms adopted for the administration of the California act, and includes a compilation of weather modification operations during this period.

In summary, the existing 13 State regulatory laws require, generally, licensing of operations; prior notice of cloud seeding operations to local governmental authorities and/or the general public in the area to be

seeded; reports by the operators to the State authorities; evaluation by State authorities and universities; certain technical qualifications to operate; and financial responsibility. This statutory approach by only approximately a quarter of the States of the Union is neither a scientific nor legal solution to the uncertainties involved in cloud seeding at this stage in its development. But, the legislation embodies the salutary principle of regulation by means of mandatory public or governmental observation. Such statutory programs if supported by adequate funds and trained personnel afford the opportunity for proper scientific observation and evaluation which can aid in the development of the science and the law and the elimination of incompetence by the accumulation of useful and valid operational and experimental data.

Litigation

Public interest in the possibilities of weather modification has stimulated the production of considerable legal periodical literature on the liability of cloud seeders for any damage which might be done to persons or property.[8] Perusal of this literature, however, will quickly reveal that it is highly speculative because of the lack of directly applicable judicial precedent. In lieu of a discussion of the cases in direct point, the writers have relied upon legal concepts in the apparently analogous fields of aeronautics and water rights. Until a body of judicial decisions has accumulated and, perhaps, until the legislatures enact special liability statutes, it is possible only to state the results of the relatively few court decisions, raise questions, and reason by analogy to the possible answers that may be given by the courts in the fullness of time.

Of the five recorded law suits, three have gone in favor of the defendant weather modifiers. One case has met procedural obstacles; another may come to trial this year or next. One of the three decided cases resulted in a jury verdict for the defendant weather modifier because of lack of negligence in operations. In the other two cases the courts refused to grant permanent injunctions prohibiting the defendants from carrying on cloud seeding operations because of the lack of proof of actual or possible damages. It is to be noted that all three of these decided cases involved decisions of trial rather than appellate courts. Thus, while these three decisions are the only existing legal authority in the field of liability for weather modification operations, they are not the final word.

In the earliest case *Slutsky v. City of New York*,[9] the plaintiff, a resort owner in the watershed area being seeded, sought to enjoin permanently the City of New York from continuing its precipitation increasing attempts. In denying the injunction petition, the court in pertinent part said:

"This Court must balance the conflicting interests between a remote possibility of inconvenience to the plaintiff's resort and its guests with the problem of maintaining and supplying the inhabitants of the City of New York and surrounding areas, with a population of 10 million inhabitants, with an adequate supply of pure and wholesome water. The relief which the plaintiffs ask is opposed to the general welfare and public good; and the dangers which plaintiffs apprehend are purely speculative. This Court will not prevent a possible private injury at the expense of a positive public advantage."

The court also stated in the *Slutsky* case, without further discussion or citation of legal authority, that the plaintiff clearly had no vested property rights in the clouds or the moisture therein. This would appear to be *dictum* in view of the language of the foregoing quotation which seems to base the court's decision not upon rules about property and water rights but rather upon equity doctrines and its public policy ideas

[8] "Who Owns the Clouds?" 1 *Stanford Law Review* 42 (November, 1948); Goldston, "Legal Entanglements for the Rainmaker," *Harvard Law School Record*, March-April, 1948; Ball, "Shaping the Law of Weather Control," 58 *Yale Law Journal* 213 (January, 1949); Brooks, "Legal Aspects of Rainmaking," 37 *California Law Review* 114 (March, 1949); "Artificial Rainmaking," 1 *Stanford Law Review* 508 (April, 1949); "Legal Clouds for Rainmakers," 14 *Albany Law Review* 204 (June, 1950); "Legal Problems Raised by Artificial Rainmaking," 4 *Vanderbilt Law Review* 332 (February, 1951); "Rain and the Law," 39 *Georgetown Law Journal* 466 (March, 1951); Engber, "Rainmaking and the Law," 29 *Chicago-Kent Law Review* 150 (March, 1951); "Rights of Private Land Owners as Against Artificial Rainmakers," 34 *Marquette Law Review* 262 (Spring, 1951); "Rainmakers and Legislation," 1 *Catholic University Law Review* 122 (May, 1951); "Whither Weather?" 19 *Journal of the Bar Association of Kansas* 385 (May, 1951); Harry, "Another Headache," 26 *Australian Law Journal* 527 (February, 1953); *Legal Report* (App. H. Bul. No. 16), California State Water Resources Board (June, 1955); "Weather Modification Legislation: A Survey," 8 *Vanderbilt Law Review* 897 (June, 1955); "The Weathermaker and the Law," 1 *South Dakota Law Review* 105 (Spring, 1956); and Oppenheimer, "Policy Considerations in Weather Modification," 30 *State Government* 109 (May, 1957).

[9] 97 N. Y. S. 2d 238 (1950).

concerning the general welfare and public good.

The case of *Avery v. O'Dwyer*[10] is associated with the *Slutsky* case because it arose from the same cloud-seeding operation conducted by New York City to attempt to increase precipitation in the Catskill Mountain Reservoir area to alleviate a serious water shortage in that city in 1950. However, the *Avery* case differs from the *Slutsky* case because it is a suit for damages. Under prevailing American law an injunction may not be granted, as was the fact in the *Slutsky* case, to prevent an injury which subsequently can be compensated by a valid claim for damages. If the *Avery* case, which is now on the crowded docket of the trial court, comes to trial, it may lead to the establishment of a significant judicial precedent in this field.

Samples v. Irving P. Krick, Inc.,[11] arose out of a cloud seeding operation sponsored by Oklahoma City in 1953 on its North Canadian River watershed. The plaintiff landowner sued for property damages incurred by a cloudburst and flood near El Reno, Okla., coincident with the defendant's cloud seeding operations. The significance of this case is that both the theory of the plaintiff's suit and the court's instructions to the jury were based upon negligence, that is, if under the weather conditions and circumstances it was careless for the defendant to seed clouds, and that if such carelessness caused or contributed to the flood, the defendant would be liable. The key paragraphs in the court's instructions state:

"Thus, if you find by a fair preponderance of the evidence, that a reasonably prudent person, skilled in the science of cloud seeding, either would have or should have known that to seed the clouds at the times and places shown by the evidence to have been seeded by defendant was dangerous in that it could reasonably have been anticipated that excessive rainfall would result, then the defendant's seeding under such circumstances would constitute negligence; and, if such negligence was a proximate cause of plaintiffs' damages, your verdicts should be for the plaintiffs.

"On the other hand, if you find that the seeding operations in question did not bring on the flood conditions in El Reno on the 18th and 19th of November 1953, but that such flood conditions were the result of natural causes *or* even if such seeding increased the amount of rainfall entering into the flood conditions, if you believe that the defendant in so seeding neither knew or had reason to anticipate that excessive rainfall would result, then your verdicts should be for the defendant."

The plaintiff did not prove his case to the satisfaction of the jury, and the verdict was for the defendant.

It is also quite important to note that neither party raised an issue as to the efficacy of cloud seeding. The lay and expert testimony and argument were directed rather to the conflicting evidence concerning the precise times, places, and circumstances of seeding which could or could not have caused the excessive rain and consequent flood damage. As with all of the reported cases, there appears to be a tendency for plaintiffs to exaggerate the powers of the cloud seeders to modify the weather and an equal tendency of the defendants to be conservative in their testimony about their cloud seeding operations.

The most recent case, *Auvil Orchard Co., Inc., et al. v. Weather Modification, Inc., and Apple Weather, Inc.,*[12] involved a petition in 1956 to convert a temporary order restraining the conduct of weather modification operations near Wenatchee, Wash., into a permanent injunction pending the trial of a suit for damages. The defendants in this case were carrying on a hail prevention operation in a 20-square-mile area by means of seeding hail producing storms under certain conditions. The court dissolved the temporary restraining order and refused to grant a permanent injunction when it concluded, on the basis of expert meteorological testimony presented by both plaintiffs and defendants, that the cloud seeding had not brought about the exceptional rainfall which caused the flash floods on the farms adjacent to the hail prevention target area. In this case plaintiffs subsequently voluntarily dismissed their suit for damages.

It is of interest to note that the litigation thus far has not produced a case involving the deprivation of precipitation. It should be noted also that two of the three decided cases involve cities as clients of the weather modifiers. Detailed discussion of the liability of these local governmental entities or the private clients of the cloud seeding firms would involve analysis of the court cases and statutory law applicable to the States and their political subdivisions' sov-

[10] 305 N. Y. 658, 112 N. E. 2d 428 (1953).

[11] Civil Nos. 6212, 6223 and 6224, W. D. Oklahoma (1954).

[12] Cause No. 19268, Superior Court, Chelan County, Wash. (1956).

ereign immunity to lawsuits in this particular field and the partially confidential terms of contracts between the parties. These contracts include a variety of provisions holding the clients and third parties harmless and clauses on the subjects of indemnification, division of operating and advisory functions and insurance coverage. Liability for the manufacture and use of weather modification equipment and associated techniques appears to be governed by the December 27, 1950 announcement of the General Electric Co. that until further notice it did not intend to enforce any of its patents relating to weather modification by the artificial production of snow and rain.

As for immunity statutes of specific application to cloud seeding activities, only three of the States which have enacted weather modification legislation declare any specific interest in the problem of governmental legal liability. Nevada, Washington, and Wyoming absolve themselves, their instrumentalities, and employees from liability or responsibility for weather modification activities of any private person or group. Also, the latter two of these States provide that their statutes shall not be interpreted as affecting any legal rights or duties of private persons or groups.

If, in the future, the Federal Government should engage in weather modification activities in such a manner as to be liable for alleged damages growing out of them, the courts would have to consider whether the Government was liable under the Constitution for taking property for a public use, liable for breach of an express or implied contract, liable for damages under the Federal Tort Claims Act or liable under a special act for this specified governmental activity. The Federal Tort Claims Act would likely be the basis for any weather modification lawsuit against the Federal Government in the absence of a special statute, because this act is the culmination of the trend away from Federal governmental immunity to suit for wrongful injuries to persons and property.

Legal Safeguards and Scientific Development

It will be seen that to one degree or another the pleadings, opinions, instructions, and decisions in these reported cases draw their reasoning and conclusions from the traditional legal rules about the law of torts (negligence) and property, doctrines of equity, and current ideas about public policy. The history of the development of the law, like the changes in most human institutions, is to lean heavily upon analogies to existing legal concepts or ways of doing things while creating new legal ideas or tools for dealing with the social, economic, and political problems produced by a new technology. Thus, as further litigation in the weather modification field develops, it would not be surprising to find the lawyers and courts trying to accommodate the relatively new practice of cloud seeding to the relatively older fields of law such as water rights (riparian, prior appropriation, and percolating water), air space, oil and gas, *ferae naturae* and natural rights. Doctrines of absolute and extraordinary liability and *res ipsa loquitur* applicable to "dangerous instrumentalities" and "extra-hazardous" undertakings might be thought applicable to weather modification activities.

Obviously, there would be expected a variety of legal and scientific opinions as to which of these existing legal ideas is applicable to cloud seeding techniques and the behavior of water in the atmosphere. At one end of this legal-scientific spectrum weather phenomena would be treated as a natural right whereby a landowner would be entitled to receive upon his land in its natural condition rain, snow, hail, and fog in their undisturbed character. The consequence of the application of this rule would be the absolute prohibition of weather modification activities over lands totally or partially in their natural condition in the absence of agreement to subject completely all such landholdings in relatively large areas of land to cloud seeding operations.

The opposite position would be to liken the water in the air in its variety of forms of "water-gas," suspended droplets of liquid water and ice particles to the boundaryless vagaries of oil and gas, wild animals, and percolating waters. Under the prevailing legal concepts the landowner-oil explorer, hunter, and water user can capture these minerals, gases, animals, and waters for his own use. With these analogies cloud seeding activity would be circumscribed only by technological and economic limitations and by the degree of legal liability attached to any negligent action or private nuisance committed while capturing the migrant water from the atmosphere.

A middle position, allowing a balance to be struck between the safety of persons and the protection of private and public property on the one hand and the advancement of science on the other, might be found by

using the riparian and prior appropriation water rights doctrines and the modern concept of correlative rights to the airspace. With the advent of air travel and other uses of airspace, the ancient common law doctrine of a landowner owning everything above his land to an indefinite height became unrealistic. In general, under these analogies reasonable invasion of the airspace for the reasonable use of the water in the air over one's property would be permitted for certain needs subject to the rights of others to use the water or the airspace to the reasonable extent needed for their legitimate purposes.

In connection with the application of the legal concept of prior appropriation of surface and ground waters in well defined courses to water in the air, it is interesting to note the following: Colorado, South Dakota, and Wyoming explicitly employ their regulatory statutes to lay a legal foundation for treatment of the water in the clouds and atmosphere within State boundaries like water in streams, expressly "appropriating" it for the State or its residents. Massachusetts provides that alteration or attempted alteration of natural weather phenomenon is "a public function." Colorado also claims ". . . the *prior right* to increase precipitation by artificial means for use in Colorado without material damage to others." (Emphasis supplied.) Furthermore, Colorado's regulatory statute reaches out and prohibits weather modification activities in Colorado for the purpose of affecting weather in any other State which prohibits such operations to be carried on in that other State for the benefit of Colorado or its inhabitants. Also, this application of prior appropriation doctrines to the water-laden atmosphere which is no respecter of State boundaries makes available analogies to the Supreme Court's rules about the equitable apportionment of the waters of interstate rivers based upon complex historical and projected future uses of these sources of water.[13]

If the legislatures and the courts adopted the desirable results of the analogies to existing law which allow unlimited or reasonable weather modification activities, their administration by the courts and regulatory agencies would depend upon the recognition of the present scientific facts. The Advisory Committee on Weather Control has established, with a satisfactory degree of probability, that cloud seeding operations on the windward slopes of the Pacific Coast States during the cooler and moist winter and spring months have produced significant overall average increases in precipitation from the storms seeded over that which would have been expected without cloud seeding. At this time the Advisory Committee's studies do not enable it to apply these conclusions either to the results of artificial precipitation increasing activities in other portions of the Nation or to the possibilities of hail and lightning suppression. This inability to extrapolate the positive results of seeding in the mountainous terrain or orographic meteorological situations in the western mountain region applies particularly to the flatlands of the Great Plains and Midwestern States. Investigators in other countries appear to have produced conclusive evidence of successful precipitation increasing in their mountainous areas. The possibilities of hail suppression are being explored in other nations. In addition, other portions of the Advisory Committee's report are devoted to statements arising from studies of and conferences on practices, techniques, personnel, material, and equipment used in weather modification operations.

It is assumed that the courts and regulatory agencies would take judicial notice of the Advisory Committee on Weather Control's findings and the conclusions of official and unofficial investigators in the United States and other nations or, at the least, admit as evidence, to be considered by judges and juries, expert testimony on these findings and conclusions. Nevertheless, the courts and regulatory agencies would be required to resolve the issues of negligence and private nuisance even in the circumstances where there was scientific certainty of weather modification techniques and results. If these facts about cloud seeding are not scientifically validated or there is the usual lag in their judicial acceptance, the presentation of conflicting expert testimony to administrative agencies and judges and juries as to what man-made or natural acts caused precipitation under specific circumstances will continue and further compound the problems of applying the legal rules permitting the capture and reasonable use of the water in the air.

Legislative Recommendations

The only ways to surely avoid the present legal *hazards* or *safeguards* (whichever word

[13] *Kansas v. Colorado*, 206 U. S. 46 (1907).
New Jersey v. New York, 283 U. S. 336 (1931).

expresses the individual view) which may inhibit cloud seeding operations conducted on a larger scale than at present and perhaps the development of the science are to: (1) Legislatively prohibit absolutely all cloud seeding activities; (2) legislatively permit these operations and clothe them with full immunity to lawsuit; or (3) legislatively establish a governmentally supported insurance fund and claims agency to pay compensation indiscriminately on behalf of the weather modifiers to all claimants out of general tax funds. These methods of avoiding the legal problems are patently unrealistic especially at this stage in the development of the science and with the attitudes of the general public as measured by the substantial areas covered by cloud seeding and the relatively small amount of litigation.

It also could be observed that the limitations inherent in the geographical jurisdiction and technical administration of the meager case law and the few State statutes cannot prevent cloud seeding under the wrong meteorological conditions or by professionally unqualified or ill-equipped operators. The same thing could be said of the lack of authority in the State laws to cope adequately with the physical and legal problems produced by cloud seeding activities carried on relatively close to State and national boundaries. Although the Advisory Committee on Weather Control is aware of these problems, it believes that the most pressing need is for basic and applied research under scientifically controlled conditions and for a sufficiently long period of time to yield results which can be analyzed and evaluated in the public interest. Therefore, the Advisory Committee has recommended the enactment of S. 86, 85th Congress,[14] which authorizes and directs the National Science Foundation to initiate and support a program of study, research and evaluation in the field of weather modification in consultation and cooperation with Federal, State, and private agencies.

The National Science Foundation research program should be implemented by substantially the same legal authority given to the Advisory Committee to obtain necessary information from all private and public persons and organizations conducting weather modification activities. The authority of the National Science Foundation to obtain such information under S. 86, if enacted into law, should be clarified in view of the ambiguity of meaning introduced into section 3 of S. 86 by the language of the appropriation item for the Advisory Committee in the Supplemental Appropriation Act for fiscal year 1958. Such clarification should make explicit the discretionary authority of the National Science Foundation to require prior notice of the objectives, times, places, and methods of weather modification activities as well as periodic reports of operations after they are undertaken. Where some States have specific statutory authority or general police power to require such notices and reports, the National Science Foundation should make appropriate cooperative arrangements with these States, within the Constitutional framework discussed above, to obtain the necessary information.

Conclusion

There are few legal precedents in the field of weather modification. None of the judgments thus far have halted the operations or awarded damages to claimants. However, they are not the final word; nor, are these court decisions of a very high order of legal authority.

There are 17 State statutes, 14 of which are regulatory. The statute which established the Advisory Committee on Weather Control and the only Federal law which specifically deals with the field of weather modification provides merely for study and evaluation of cloud seeding activities. There is proposed Federal legislation which would authorize a long-range program of basic and applied research and evaluation.

Based upon the character of the court cases, present and proposed State and Federal legislation, and the analogies to existing legal concepts available to the courts, it is concluded that there will be maintained and further created a legal environment which both reasonably safeguards our people and their public and private property and permits the development of weather modification for the general public welfare. **[The End]**

More than 95 per cent of vehicles involved in fatal accidents on United States highways in 1957 were in apparently good condition.

[14] S. 86, as amended, passed Senate unanimously and referred to the House Committee on Interstate and Foreign Commerce. See S. Rept. 607 by Committee on Interstate and Foreign Commerce, and hearings before that Committee on March 26 and May 13, 1957, during 1st sess., 85th Cong.

Adjustment of Partial Losses to Cargo Under Valued Marine Policies

By ERNEST L. KERLEY

This article is reprinted, with permission, from the November-December, 1957 issue of the Northwestern University Law Review. *Mr. Kerley is with the Legal Adviser's Office, Department of State. The views expressed in this article do not purport to represent those of the Department of State.*

MUCH OF THE LAW of marine insurance is based on decisions of the seventeenth and eighteenth centuries which were reached on the basis of even earlier practice within the merchant community. In an age when the safe conclusion of a sea voyage was not to be taken for granted, a sense of shared peril led to a careful assessment of the portion of the risk attributable to each participant in a joint venture. For instance, although no reference to coinsurance appeared in the marine policy, the practice of coinsurance was uniformly applied to the settlement of losses under marine policies. Pursuant to this practice, a merchant was deemed to have apportioned the risk of loss between himself and his insurer in the event that he failed to purchase an amount of insurance equal to the full value of the shipment. A partial loss was thus paid by the insurer only in the proportion which the amount of insurance bore to the value of the shipment at the time of loss. A marine policy could either be valued, in which case the value of the shipment was specified in the policy, or open, in which case the value of the shipment was not specified. The adjustment of losses presented special difficulty in cases where the value stipulated in a valued policy proved not to be the value at the time of loss. The rule which is the subject of this study served to meet this problem.

Before proceeding with the analysis of this rule, the losses to which it might be applied may be noted. The policy covered loss arising from "perils of the seas." However, it was possible for a merchant to suffer a loss, even though no damage had been done to his shipment, in the form of a general average loss. When the goods of one merchant were deliberately sacrificed by the master of the vessel as a necessary part of a process which saved the rest of the ship and cargo as, for example, where part of a cargo was jettisoned to float a vessel off a reef, that loss was borne by all the shippers and by the owners of the vessel, in the proportion which the value of their shipment or vessel bore to the total value involved. The marine policy specifically covered a general average assessment against a shipper. As distinguished from general average losses, particular average losses were those not incurred in the general interest. These were borne by the individual shipper, or his insurer, without contribution from the other shippers or the owner of the vessel.[1]

The rule for the settlement of partial losses to cargo under valued policies has been stated by courts in practically unvarying form for two hundred years, and was followed by the United States Supreme Court in 1929. Nevertheless, the traditional statement is a misleading one in cases where the value specified in the policy is greater than the amount of insurance, and the judicial history of the rule does not suggest that the reasons for the rule have always been fully understood. This lack of understanding may have arisen from the unique nature of the mercantile transac-

[1] Because of the confusion often associated with the term "particular average," this article will use the term "partial loss" exclusively. The term "policy value" is also sometimes misleading. In view of the necessity of distinguishing between the value in the policy, that is, the amount of insurance provided by the policy, the terms "valuation" or "agreed value" and "amount of insurance" will be used exclusively.

tion, with its duality of shipment values.[2] The purpose of this study is to clarify the statement of the traditional rule for the adjustment of partial losses to cargo under valued marine policies, and to examine its appropriateness with regard to the mercantile transaction in which it is applied.

Gulf Refining Company Case

Gulf Refining Company v. Atlantic Mutual Insurance Company[3] was an action on a war-risk policy for $27,690 on a cargo of gasoline valued in the policy at $212,000. During April, 1915, while en route to France, the ship was torpedoed, and various expenses of a general average nature were incurred. A contribution of $49,088.04 was assessed against the cargo, based on its actual value of $417,178. The question litigated was the extent of the insurer's liability for this assessment. The plaintiff claimed $6,411.54, which was the portion of the contribution which the amount of insurance bore to the agreed value. The defendant admitted liability only to the extent of $3,258.25, which was the portion of the contribution which the amount of insurance bore to the actual value. In other words, neither party questioned the applicability of coinsurance, but they disagreed as to whether the coinsurance was to be determined on the basis of the agreed value or the actual value.

The plaintiff's conclusion, that the underwriter is bound to indemnify the assured for general average contributions without regard for the difference between agreed value and actual value, was based on two propositions:[4]

(1) *Under the New York or American rule, general average contributions on hull policies are paid without reference to any difference in value between agreed value and actual value.* This appears to be the rule in most American jurisdictions.[5] Some dissatisfaction with the contrary rule may be noted in English decisions.[6]

(2) *No distinction is made generally between hull and cargo policies.* This proposition is clearly incorrect, and the cases cited do not support it.[7] The explanation generally given for the distinction between hull and cargo policies is that the ship, when damaged, is ordinarily repaired rather than sold in its damaged condition. Thus, the measure of damages is not the reduction of selling price but the cost of repairs[8] so long as the vessel is reasonably repairable.[9] That this proposition is untenable was recognized by the court.[10]

The defendant's conclusion, that a general average contribution is subject to coinsurance on the basis of the actual value, was also based on two propositions:[11]

(1) *In the case of a particular average loss, coinsurance is computed on the basis of the*

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[2] See *American Insurance Company v. Iaconi*, 7 Fire and Casualty Cases 867, 67 Del. 167, 89 Atl. (2d) 141 (1952), which considers the question of whether this rule might be applied to a partial loss to buildings under a valued fire policy. The traditional distinction between partial losses to cargo, which are adjusted on the basis of the difference in value of the shipment in damaged and undamaged condition, and partial losses to vessels, which are adjusted on the basis of the cost of repairs, supports the court's refusal to apply this rule to a fire loss on a building, which must necessarily be adjusted on the basis of cost of repairs. Moreover, the difficulty which the traditional rule is designed to meet is the fact that two values—the value at the port of embarkation, on which the insurance is purchased, and the value at the port of debarkation, on which the loss is computed—complicate the adjustment process. This problem is not present in the adjustment of an ordinary fire loss. These considerations are discussed in detail in the body of this article. *But see Elcock v. Thomson* [1949] 2 K. B. 755, applying this rule to the adjustment of a partial dwelling loss under a fire policy.

[3] 279 U. S. 708 (1929).

[4] Brief for appellant, pp. 14-24.

[5] *The Providence and Stonington Steamship Company v. The Phoenix Insurance Company*, 89 N. Y. 559 (1882); *International Navigation Company v. Sea Insurance Company*, 129 F. 13 (CCA-2, 1904); *accord, British & Foreign Marine Insurance Company v. Maldonado & Company*, 182 F. 744 (CCA-9, 1910), cert. den., 220 U. S. 622 (1911).

[6] See *Steamship Balmoral Company v. Marten*, [1901] 2 K. B. 896.

[7] *International Navigation Company v. Atlantic Mutual Insurance Company*, 100 F. 304, 315 (DC N. Y., 1900). While the language is not clear, a careful reading suggests it refers to ship policies only. *Francis v. Boulton*, 65 L. J. Q. B. (n. s.) 153 (1895), and *Gracie v. New York Insurance Company*, 8 Johns 237 (N. Y., 1811), involve questions other than general average.

[8] See *International Navigation Company v. Atlantic Mutual Insurance Company*, cited at footnote 7, at p. 317.

[9] The determination of the repairability of the vessel is made on the basis of cost of repairs compared to the actual value of the ship after repairs. Thus, the agreed value of the ship plays no part in determining whether to treat the loss as total or partial. (*Irvining v. Manning*, 1 H. L. C. 287, 9 Eng. Rep. 766 (1848).)

[10] "We need not determine whether the rules as to hull insurance may be regarded as that of this court. . . . The distinction between insurance on cargo and that on hulls is an old one and a different result in the case of the latter may for that reason be accepted without affecting the rule as to the former." (279 U. S. 708, 713.)

[11] Brief for appellees, pp. 10-19, *Gulf Refining Company* case, cited at footnote 3.

actual value. The cases cited in support of this proposition will be considered later, but it may be said that it is substantially correct.

(2) *General average is not distinguishable, in legal nature, from particular average.* Despite rather shaky support for this rule,[12] it was accepted by the Court, on the basis that both general and particular average losses are covered by the policy and that the policy does not suggest they are to be treated on a different basis.[13] On the basis of these propositions, the Court approved the rationale of the defendant, and affirmed for that party.

The rule for the settlement of partial losses under valued marine cargo policies, of which this case is the most recent authoritative statement, would seem to be of sufficient importance to warrant a short study of its development, and an analysis and evaluation of it. However, the multiplicity of concepts in marine insurance cases makes a careful differentiation necessary. Cases dealing with open policies, or policies on hulls, would appear to have little value. In view of the uncertain nature of general average cases, it is believed unwise to utilize them except where, as in the *Gulf Refining Company* case, the Court specifically indicates it regards the issue as identical with particular average.

English Cases

The rule for the adjustment of partial losses under valued cargo policies suffered initially from an inaccurate formulation, in that the court failed to distinguish between the amount of insurance and the agreed value for purposes of computing the insurer's liability. Before this error had been corrected, the rule had been further obscured by the heresy that the valuation was applicable only to total loss adjustments. It was thus relatively late in the history of the rule before it was correctly stated, and even later before the correct statement had been uniformly recognized.

The rule appears to have been given its first legal statement in the case of *Lewis v. Rucker*,[14] in 1761. The action was brought on a cargo policy covering a number of hogsheads of sugar valued at £30 each. In the course of the voyage the sea water got into every hogshead with the result that on their arrival it was necessary to sell them immediately to prevent further spoilage. In their damaged condition they were sold for £20 per hogshead, the undamaged price being £23. The underwriter paid into court a sum computed in the following manner: "He paid the like proportion of the sum at which the sugars were valued in the policy as the price of the damaged sugars bore to sound sugars at . . . the port of delivery." The plaintiff did not dispute that this was the general rule, but claimed an exception on the grounds that unexpected political events had caused the market price of sugar to drop substantially during the period the sugar was in transit, and that prior to the arrival of the sugar at the port of delivery he had notified his agent to store the sugar until the price had risen to £30, but that this had been impossible because of the condition of the sugar on its arrival.

A special jury of merchants considered the question, without instructions from the court, and decided that the method of adjustment proposed by the defendant was correct, even in view of the special circumstances of the case. On motion for new trial, the King's Bench Division affirmed the decision.[15]

Two questions argued before the King's Bench warrant discussion. First, the plaintiff argued that a valued policy is a wager policy, like an interest-or-no-interest policy,[16] and that the value specified is fictitious. For this reason he argued that an adjustment could not be based on that valuation and must be made on the basis of a total loss, abandoning to the underwriter whatever portion of the cargo was saved. The court rejected this argument on the grounds that a valued policy is not a wager policy, but rather an attempt to establish the prime

[12] In *Steamship Balmoral Company v. Marten*, cited at footnote 6, the court seriously questioned the soundness of the rule, and expressed the opinion that the American rule was different.

[13] 279 U. S. 708, 711.

[14] 2 Burr. 1167, 97 Eng. Rep. 769 (1761).

[15] It appears that this method of adjusting partial losses on valued cargo policies, though new to the courts, was already well established by the practices of the trade. Even the plaintiff did not dispute that this was the general rule, but alleged that the special facts of his case constituted an exception. Lord Mansfield, who presided at the trial and later gave the opinion when the motion for new trial was considered, indicated that during the interval between the trial and the motion he had discussed the question with experienced adjusters. Apparently, substantial agreement on the rule had been reached by the trading community prior to 1761.

[16] In an interest-or-no-interest policy the insurer was precluded, in the event of loss, from inquiring whether the assured had any insurable interest in the ship or cargo which was insured. Its use as a wagering device led to its prohibition in 1741 (Act to Regulate Insurance on Ships, 1746, 19 Geo. 2, Ch. 37).

cost "just as if the parties admitted it at the trial." This constitutes one of the first attempts to establish the legal nature of the valuation, a question which has been the subject of considerable disagreement. It will be seen that subsequent opinions dealt with this question in terms of estoppel or contract. No subsequent case appears to have equated it with an admission by a party before the court.

The plaintiff's second argument was that the measure of damages should be the difference between the selling price of the damaged goods and the prime cost. The court considered this "impossible," since it would involve the underwriter in the fluctuations of the market. It may be questioned whether it is not essential that the underwriter be involved in the fluctuations of the market if he is to indemnify the assured for losses suffered in an area where value is determined in a fluctuating market. This will be discussed in detail later.

The most significant feature of this case is the failure of the special jury and the court to distinguish between the agreed value and the amount of insurance. Contrary to the statement of the court, the underwriter's liability must be computed by applying the proportion of loss to the amount of insurance, not the agreed value. If the underwriter's liability were to be computed as a portion of the agreed value, that liability would obviously be the same whether the underwriter had insured all of that value or only part, so long as the loss did not exceed the amount of insurance. Thus, where a cargo valued at $1,000 was damaged by half, the underwriter would be liable for $500 whether his policy was for $1,000, $750 or $500. This would make co-insurance inapplicable to the settlement of partial losses and would be manifestly unfair to the underwriter. In *Lewis v. Rucker*, the valuation and the amount of insurance appear to have been the same, so the failure to distinguish between them did not affect the outcome of the case.

Twenty-one years later, Lord Mansfield, in his opinion on *Le Cras v. Hughes*,[17] attempted to distinguish *Lewis v. Rucker* on invalid grounds, and created a misunderstanding which was to vex students of the law for more than a century. *Le Cras v. Hughes* was an action on a policy covering a ship and cargo captured by a British land and naval force. The insurer issued a valued policy to the captain of the naval force, and the prize was subsequently lost, with a large part of her cargo, by perils of the sea. With regard to the computation of the loss, the court said:

"The soldiers have a share by agreement, which reduces the share of the Navy to much less than the sum insured. I thought at first that this case resembles the case of *Lewis v. Rucker*, which we think right whenever the goods are described as by hogsheads, etc. The constant usage has been, where it is a total loss, to pay the whole; but where it is an average loss it opens the policy. We have found the origin of this custom: it arose from a case at Guildhall, M. 21 Geo. 2, *Erasmus v. Banks*, before Lord Chief Justice Lee, where it was agreed that the word valued is an estoppel on both parties in case of total loss, but not in case of a partial loss. Another case was cited where the same point was ruled. This appears to us to be a reasonable rule, and therefore we are of the opinion that the computation must be made on the real interest on board."

Despite the efforts of the court, it seems doubtful that these cases can be distinguished on their facts. Innocent overvaluation, such as occurred here, was subsequently held to form no basis for overturning the valuation;[18] this was probably the rule in 1781. At any event, the distinction drawn by Lord Mansfield, that in *Lewis v. Rucker* the goods were described by the hogshead, seems meaningless. Had the partial loss in *Lewis v. Rucker* involved a total loss to some of the hogsheads and no damage to others, the fact that the hogsheads were individually valued might have some significance. But this was not the case in *Lewis v. Rucker*, which involved partial damage to each hogshead. In view of this fact, the method of adjustment would necessarily have been the same, regardless of the description.

Tacitly recognizing that the cases could not be distinguished on their facts, able students have suggested an interpretation of the phrase "opens the policy" which is not inconsistent with the rule of *Lewis v. Rucker*. In *International Navigation Company v. Atlantic Mutual Insurance Company*, the court said:

"It is a curious result of this rule of adjustment, however, that the policy value has no bearing on the settlement . . . the mode of settlement on each policy is precisely the same as an open policy; that is, to pay the same proportion of the insurance

[17] 3 Dougl. 81, 99 Eng. Rep. 549 (1782).

[18] *Aubert v. Jacobs*, Wights. 118, 145 Eng. Rep. 1197 (1810).

that the loss bears to the sound value; and if any one policy does not insure more than the actual value, which rarely happens, it will pay the same amount that it would pay if the policy were open. Hence the maxim . . . that 'a partial loss opens the policy', which to the above extent is correct." [19]

While this is a correct analysis of the *Lewis v. Rucker* rule, it cannot be the meaning which Lord Mansfield placed on the phrase "opens the policy." In the first place, Lord Mansfield stated that the computation was to be made on "the real interest on board." Nothing in the opinion sustains the suggestion that this interest would not have been used as the basis of computation if it were less than the amount of insurance. In the second place, the analysis presupposes a recognition of the distinction between the amount of insurance and the agreed value. It has already been suggested that, whether or not Lord Mansfield was aware of this distinction, it was not used by him as a tool of analysis.

A similar view is expressed in a well-known text:

"There was an opinion at one time entertained by writers of eminence that . . . in cases of average loss . . . the policy was to be opened. . . . supposing a particular average loss to take place on a valued policy on goods . . . it would be necessary for the assured . . . to prove the insurable value of the goods, i.e., their prime cost, together with the premiums of insurance. . . . The phrase is unhappy, and suggestive of error. . . . It is quite clear, however, that the meaning of the words is simply that in case of an average loss the parties must necessarily go out of the policy to ascertain the extent of damage done to the goods." [20]

It is submitted that the natural meaning of the words "the real interest on board" is exactly that which the quoted text seeks to exclude, the prime cost and premiums of insurance. Moreover, it must be remembered that in *Le Cras v. Hughes* the court intended to distinguish *Lewis v. Rucker*, not to follow it. It would therefore appear that Lord Mansfield intended the phrase to mean that a partial loss was to be adjusted without reference to the agreed valuation, and this view is supported by many of the texts of the nineteenth century.[21]

Since the rule in *Le Cras v. Hughes*—that a partial loss on a valued policy must be adjusted in the same manner as a partial loss on an open policy, so long as the policy description is by the entire cargo—is obviously inconsistent with the rule announced in *Lewis v. Rucker* a few years earlier, and since, as has been indicated, the cases cannot be distinguished on their facts, it is interesting to speculate on the reason for the contradictory rule. A possible explanation is found in the fact that neither of the cases which the *Le Cras* case purported to follow appears to have been reported.[22] For this reason it is not known whether they dealt with insurance on hull or cargo. As had been indicated, the adjustment of partial losses to hulls is conducted on the basis of the cost of repairs, so that the valuation plays no part.[23] Thus, with regard to hull policies, it is undoubtedly true that "a partial loss opens the policy." Assuming that the cases stated the practice of adjusters for the settlement of losses to hulls, it is not difficult to see how Lord Mansfield might have misapplied the rule to a cargo loss, since the policy in *Le Cras v. Hughes* covered both hull and cargo. This is not to suggest that *Le Cras v. Hughes* is correct. It will be recalled that the only partial loss in the case was to the cargo, the ship having been totally lost.

Whatever the explanation for the maxim that a partial loss opens the policy, it did not present any serious obstacle to the correct adjustment of losses in the years that followed. In *Goldsmid v. Gillies* [24] the use of the agreed value in the settlement of a partial loss on a cargo of coffee does not seem to have been questioned by either side. The issue was whether or not a partial loss existed where the entire cargo was confiscated by a foreign government, which afterwards allowed the shipper a partial reimbursement. In this case, although the description and valuation in the policy had been as an entire cargo rather than by the hogshead, the court failed to follow the distinction drawn in *Le Cras v. Hughes*, and followed *Lewis v. Rucker* specifically.

[19] Cited at footnote 7, at p. 324.

[20] Arnould, *Marine Insurance* (14th Ed., 1954), Vol. 1, Sec. 340.

[21] See, for example, Park, *Marine Insurance* (8th Ed., 1842), Vol. 1, p. 235; Phillips, *Insurance* (1867), Vol. 2, p. 21.

[22] Park indicates the term in which *Erasmus v. Banks* was tried as Mich. 21 Geo. 2, and states that its companion case, *Smith v. Flexney*, was tried at about the same time (volume cited at footnote 21, at p. 235). This would indicate that the cases were tried in the fall of 1747.

[23] See footnote 9.

[24] 4 Taunt. 804, 128 Eng. Rep. 547 (1813).

It is of even greater significance that in this case the distinction between the agreed value and the amount of insurance was recognized. The underwriter, having subscribed for only two thirds of the value of the cargo, was held liable for only two thirds of the computed liability. It is not clear whether this distinction would have been drawn in *Lewis v. Rucker* had the facts required it or whether the refinement was the product of the 52 years which elapsed between the cases. Although this case represents the first correct statement of the rule, it appears to have been generally overlooked, to the detriment of the law on this question. Nor was the rule disputed in *Johnson v. Sheddon*,[25] a case involving partial loss to a cargo of brimstone, in which both sides agreed that the rule of *Lewis v. Rucker* should be used to estimate the loss. The principal problem in the case was an attempt by the assured to distort the meaning of the rule by using the net, rather than the gross, value of the damaged goods at the port of delivery. The referee had calculated the loss by comparing the respective prices of sound and damaged goods, less port duties and other charges after the arrival in port.[26] The underwriter moved for a new trial, which was granted. The appellate court concentrated on a rather close analysis of the words of Lord Mansfield in *Lewis v. Rucker*, and based its decision on his use of the term "price," which they took to mean "the whole sum to be paid for the thing."

Dicta in *Usher v. Noble*,[27] a case involving an open policy, also indicates the rule of *Lewis v. Rucker* to be well established; in *Forbes v. Aspinall*[28] the validity of the rule was not debated, although an exception was made on the facts, there having been but a part of the cargo on board at the time of the loss. In all of these cases, the decision in *Le Cras v. Hughes* seems to have been recognized as erroneous, and appropriately disregarded. The development reached its logical conclusion in the case of *Steamship Balmoral Company v. Marten*,[29] where both parties agreed that a valued policy could not be opened, but were unable to agree on what the phrase "open the policy" meant, with the result that each accused the other of attempting to do it.

It is disappointing to note that the subsequent cases also neglected to notice *Goldsmid v. Gillies*. Despite the value of the distinction drawn in that case, the subsequent cases continued to quote the rule as it had been stated in *Lewis v. Rucker*.

If any uncertainty existed on either question, however, it was resolved by the Marine Insurance Act of 1906,[30] which was articulate on both of these points:

"67. (1) The sum which the assured can recover in respect of a loss on a policy . . . is called the measure of indemnity.

"(2) . . . the insurer . . . is liable for such proportion of the measure of indemnity as the amount of his subscription bears to the value fixed by the policy. . . .

"71. (1) Where part of the goods . . . insured by a valued policy is totally lost, the measure of indemnity is such proportion of the sum fixed by the policy as the insurable value of the part lost bears to the insurable value of the whole. . . .

"(3) Where the whole, or any part of the goods . . . has been delivered damaged at its destination, the measure of indemnity is such proportion of the sum fixed by the policy in the case of a valued policy . . . as the difference between the gross sound and damaged values at the place of arrival bears to the gross sound value."

American Cases

The earlier American cases on this question were characterized by an unquestioning adherence to the rule of *Lewis v. Rucker*, to the complete exclusion of *Goldsmid v. Gillies*. This proved unfortunate in view of the fact that *Lewis v. Rucker* was not a correct statement of the rule.

A possible explanation for this is the familiar doctrine that the American common law includes all decisions prior to 1776, but not those after that date.[31] This would explain the readiness of the courts to notice the 1761 decision, but not the 1813 one. Some doubt must be expressed regarding this explanation in view of the tendency of American courts to regard British courts as pre-eminent in maritime questions and to treat British decisions, even recent ones, as highly persuasive.[32] This strongly suggests that the

[25] 2 East 579, 102 Eng. Rep. 492 (1802).

[26] The purpose of comparing the prices of sound and damaged goods is to establish the proportion of loss. It is obvious that any fixed charges subtracted from both figures would have the effect of increasing the proportion.

[27] 12 East 637, 104 Eng. Rep. 249 (1810).

[28] 13 East 326, 104 Eng. Rep. 394 (1811).

[29] Cited at footnote 6.

[30] 6 Edw. 7, Ch. 41.

[31] *Grimmet v. Hughes*, 148 Ga. 461, 192 S. E. 191 (1937); *Cawker v. Dreutzer*, 197 Wis. 98, 221 N. W. 401 (1928).

[32] *Queen Insurance Company v. Globe & Rutgers Fire Insurance Company*, 263 U. S. 487 (1923); *The Eliza Lines*, 199 U. S. 119 (1904).

failure of American courts to follow, or even consider, *Goldsmid v. Gillies* was merely an oversight.

The earliest reported case appears to be *Lawrence v. The New York Insurance Company*[33] decided by the supreme court of judicature in October, 1802. This was an action on a policy covering a cargo of logwood and tobacco.[34] The cargo was partially damaged by insured perils, and the court did not question that the rule of *Lewis v. Rucker* was to be applied. However, the dispute concerned the question of whether the adjustment should be made on the basis of gross or net value. Coincidentally, this case, involving the same issue as *Johnson v. Sheddon*, was decided at the same time. Although the British case was decided in July of 1802, the comments of the American court indicate that the judges had not yet read the King's Bench decision, and had only the nisi-prius decision, in which, it will be recalled, the court had sustained the action of the assessor in using the net value as the basis of computation. In the American opinion, Justice Thompson mistakenly believed that the assessor had used the gross proceeds, although he admitted that the case was "imperfectly reported," while Justice Kent recognized that the assessor had used the net proceeds, but favored not following it. The result was that the court unanimously decided on the use of the gross value, a decision which was, happily, in complete accord with the King's Bench in the British case.

In 1839, in the case of *Natchez Insurance Company v. Bruckner*,[35] the High Court of Errors and Appeals of Mississippi also followed the standard rule, holding that the adjustment must be made on the basis of the agreed value. The case concerned a cargo of cotton damaged when the steamboat on which it was shipped was wrecked in a storm, and it is noteworthy mainly for an attempt by the plaintiff to hold the insurer liable for the difference between the selling price of the cotton in its damaged condition and the agreed value. The court rejected this method of computing damages, and pointed out that the effect of it was to make the underwriters insure the state of the market. This recognition of the distinction between insuring the market price of goods and insuring the shipper against a loss determined on the basis of the market value is basic in the analysis of this rule. The intention of a valued policy is not to guarantee that the cargo will sell in the port of arrival for the value agreed in the policy. As will be seen, it is not even completely accurate to say that the valuation is an agreement as to what the market value would have been in the port of departure.

Predictably, the court elected to follow *Lewis v. Rucker* and directed that the recovery be computed on the basis of the agreed value rather than the amount of insurance. Since the opinion does not indicate the latter figure, it is uncertain whether this error affected the result.

The fault in a blind adherence to *Lewis v. Rucker* was more clearly demonstrated in the Massachusetts case of *Fay v. Alliance Insurance Company*.[36] At the time of this decision it was well established in Massachusetts that the insurer's liability was to be computed on the basis of the valuation. This had been the holding of *Forbes v. Manufacturers Insurance Company*[37] in 1854 and *Lord v. Neptune Insurance Company*[38] in 1857. In both of these cases, the amount of insurance was equal to the valuation, so the outcome of the case was not affected by the error. However, the *Fay* case involved a policy of insurance for $12,500 on freight, valued in the policy at $25,000. The court thus found itself in the same position as was Lord Mansfield in *Goldsmid v. Gillies*, in that the application of the established, but incorrectly stated, rule would lead to substantial injustice. In these circumstances, Mansfield, who understood the reason for the rule, had restated it; the Massachusetts court did not. The court held:

"This was a case of partial loss, and the underwriters were responsible only for the proportion *of the amount of the entire valu-*

[33] 3 Johns. 217 (N. Y., 1802).

[34] It is not clear from the statement of facts that this case involved a valued, as opposed to an open, policy. The court discussed the application of the proportion of loss to the "prime cost." The use of the term "prime cost" would suggest that the policy was open. This is not conclusive, however, since the valuation in a valued policy may be regarded as an agreement between the parties concerning the amount of the prime cost. In addition, it may be noted that the two cases referred to in the opinion, *Lewis v. Rucker* and *Johnson v. Sheddon*, both involved valued policies. Moreover, the court spoke of the importance of preserving "a due proportion of the value in the policy." Thus it is considered probable that the policy was a valued one.

[35] 5 Miss. 63 (1839). The case was twice more before the High Court of Errors and Appeals of Mississippi on other grounds. 6 Miss. 744 (1841), new trial ordered, 10 Miss. 340 (1844), new trial ordered. No final decision on the case appears to have been made by the court.

[36] 82 Mass. 455 (1860).

[37] 67 Mass. 371 (1854).

[38] 76 Mass. 110 (1857).

ation of freight in the policy, which the freight actually lost by the peril insured against bore to the actual value of the entire freight."[39] (Italics supplied.)

It is obvious that the result of this rule was to cause the underwriters to pay twice as much as they should have been required to pay.

It is interesting to note that two other rules proposed for the settlement of partial losses were discussed in the opinion. The rule adopted by the trial court was to multiply the amount of the loss by the proportion of the amount of insurance to the agreed value. This was rejected by the court on the grounds that it would deprive the underwriters of the whole benefit of the valuation in the policy. Why the trial court adopted this rule is difficult to understand. It is clearly at variance with *Forbes v. Manufacturers Insurance Company* and *Lord v. Neptune Insurance Company*. Its rationale seems to be that the purpose of the agreed valuation is merely to fix the extent of coinsurance; it is submitted that, assuming an opportunity on the part of the insurer to investigate the value of the cargo, this is a not-indefensible view.

The second rule mentioned in the opinion was that submitted by the defendants. They suggested that the amount saved be deducted from the agreed valuation and that the insurer be required to pay the proportion of the remainder which the amount of insurance bore to the agreed valuation.[40] This rule obviously would operate to the detriment of the assured in cases of undervaluation and to the detriment of the insurer in cases of overvaluation. It probably represents an attempt to treat this as a salvage loss, rather than a particular average.[41]

It is noteworthy that both of these rules clearly recognize the distinction between the amount of insurance and the agreed valuation. Since this distinction was before the court, its failure to utilize the distinction can only be explained by a mechanical adherence to what it took to be the established rule.

The Midwest did no better. In *Lamar Insurance Company v. McGloshen*[42] the Illinois Supreme Court considered the settlement of a partial loss on a valued policy on a cargo of grain, shipped on the Great Lakes from Chicago to Montreal. Predictably, the court indicated the basis of liability to be the "valuation in the policy." Since the cargo was insured to the amount of the valuation, this error did not affect the result.

It is in the light of these cases that the opinion of the United States Supreme Court in the *Gulf Refining Company* case[43] must be assessed. The Court said:

"It has long been the accepted rule that in the case of a partial loss of cargo insured under a valued policy, with the valuation honestly made, the insured, in case of increase or decrease in its value, recovers that proportion of his loss which the agreed value, *or so much of it as was assumed by the particular insurer*, bears to the sound value. In case of an increase in value his recovery is thus limited as though he were a coinsurer. . . . Agreed value thus stands in the place of prime value under an open marine policy, where the insured recovers such part of his loss as prime value bears to sound value." (Italics supplied.)

Merely in recognizing the importance of distinguishing between the amount of insurance and the agreed valuation, the Court displayed considerable insight. In addition, since *Goldsmid v. Gillies*, the English case in which the distinction was first recognized, was not cited by the Court, it may be assumed that this recognition proceeded from a clear understanding of the issues involved, which was frequently lacking in the earlier cases. Finally, its attempt to ignore the error of previous courts and create a consistent and valid rule where none existed, by a single phrase, is an impressive display of judicial craftsmanship.

This is not to suggest that the synthesis is accurate. The recognition by the Court that the loss must be adjusted not on the basis of the agreed value, but on the basis of the portion of that value which was assumed by the underwriter (the amount of insurance) was not, as we have seen, shared by the courts which handed down the preceding decisions. This is manifest in the *Fay* case, where the failure to draw this distinction doubled the size of the judgment against the insurer. It is no less true in the *Lord* case, where, although the outcome of the case was not affected, no mention of the distinction appears in the opinion. Even

[39] Cited at footnote 36, at p. 459.

[40] Cited at footnote 36, at p. 458.

[41] For a discussion of the distinction between salvage losses and particular average, and the method of adjusting the former under a valued cargo policy, see *London Association v. Companhia de Moagens do Barriero*, 167 U. S. 149, 170-175 (1896).

[42] 54 Ill. 513 (1870).

[43] Cited at footnote 3.

more persuasive is the fact that in several of the cases it is impossible to know whether the size of the judgment is correct because the courts did not consider the amount of insurance important enough to mention. Tacit recognition by the Supreme Court that its synthesis, while a nice judicial courtesy to the erring courts, was a departure from fact which ought not to be stretched too far may be found in the fact that while the Court cited the *Lord* case in support of its proposition, it did not cite the *Fay* case, although the two cases were decided by the same court on the same issue within a six-year period.

Because language in a prior circuit court case [44] had suggested that the basis of the agreed valuation was estoppel, the court chose to go into this matter fully, commenting as follows:

"The application of the agreed value to the adjustment of the insurance loss does not depend on estoppel. . . . The policy agreement valuing the cargo at a specified amount is not a representation, or so regarded. It is no more than a stipulation, in effect, that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value." [45]

It will be suggested later that this analysis reveals a remarkably clear insight into the real nature of the valuation.

Analysis of Rule

In analyzing a rule of insurance adjustment, it is of primary importance that the objective of the rule be clear. Presumably, the objective of any rule of adjustment is to indemnify the assured. However, the word "indemnify" has two meanings when used in this context. The first is that the assured is to be placed in the position he would have been in had the venture not been undertaken; the second is that the assured is to be placed in the position he would have occupied had the venture been successfully completed.[46] Of these, the former is the almost universal rule,[47] and has the important advantage of ease of application. Considerable theoretical merit is possessed by the latter, however. It has been suggested that it is more in accord with the purpose of marine insurance:

"The true end of marine insurance . . . is to relieve the merchant from the consequences of a loss by sea, and not to annul a speculation once entered into. Every well-informed merchant . . . may be supposed in general to wish, that such events as prevent his speculations from being realized might not take place, and it is much more to his advantage that the underwriter should gain the premium, than that his speculation should be frustrated, and the prime cost restored to him. Hence it necessarily follows, that a method by which the assured, after a loss at sea, is placed in the same condition in which he would have been, if his goods had arrived safe at the place of their destination, is much more conformable to the nature of a mercantile transaction, than that which places him in the condition in which he was before he undertook the adventure." [48]

Where the agreement is to place the assured in the position he would have been in had the venture not been undertaken, the value of the cargo includes the following elements: (1) market value of the goods at the port of origin plus expenses incurred prior to sailing, including the premium of insurance; (2) freight, duties and landing charges, or a portion thereof, depending on whether the partial loss occurs by damage to all items or total loss to some. Whether or not the intention of the parties is to cover even this much must be ascertained from the terms of the policy. Should the underwriter receive a premium for only the goods, the expenses of freight would not be recoverable from him. Where the agreement is to place the assured in the position he would have been in had the venture been completed, the value of the cargo consists of the element stated above and, in addition, (3) the profit or loss arising from the state of the market.[49]

The terms "gross departure value" and "gross arrival value" are suggested for these concepts.[50]

As previously indicated, several legal analyses of the valuation in a marine policy have been offered. In *Lewis v. Rucker* the court sought to equate it to an admission in court.[51] In *Le Cras v. Hughes* the court quoted with approval from *Erasmus v. Banks*

[44] *British & Foreign Marine Insurance Company v. Maldonado & Company*, cited at footnote 5.

[45] Cited at footnote 3, at p. 712.

[46] See McArthur, *The Contract of Marine Insurance* (2d Ed., 1890), pp. 67-74.

[47] Arnould, volume cited at footnote 20, at Sec. 338.

[48] Benecke, *Indemnity in Marine Insurance* (1824), p. 5.

[49] Work cited at footnote 48, at pp. 3-25.

[50] See Keate, *Guide to Marine Insurance* (11th Ed., revised (1950), p. 98.

[51] Cited at footnote 14.

that the valuation was an estoppel on both parties.[52] A century later, in *British & Foreign Marine Insurance Company v. Maldonado & Company*, the court espoused the same view.[53] This view of estoppel was, as we have seen, expressly rejected by the court in the *Gulf Refining Company* case, in favor of a contractual interpretation.[54] The contractual viewpoint was not new with the United States Supreme Court, however, the first expressions of this analysis having been in the case of *Aubert v. Jacobs*[55] in 1810.

Of these interpretations, the first can be dispensed with quickly. It is probably that the phrase "just as if the parties admitted it at the trial" represented not an attempt to analyze the legal nature of the valuation, but an expression of its nature as completely binding on the parties. Even if this is not so, the phrase has not been used by other courts, and its utility as a tool of analysis would appear to be negligible. The second and third analyses appear sounder. It may be questioned whether they are necessarily incompatible or whether an amalgamation may not be sought in the doctrine of estoppel by contract. An eminent author has defined this doctrine as follows:

"A fact agreed or assumed to be true, as the basis of a contract, must be taken to be true specifically until the contract itself is lawfully impeached by plaintiff or by defendant, or until some legal proceeding is taken to impeach the truth of the [supposed] fact; assuming the contract itself is not contrary to law." [56]

This rule is well established and an obvious application of equity principles.[57] Indeed, the question has been raised whether it is not too obviously valid to require the citation of authority.[58] It appears, at first glance at least, to be clearly descriptive of the valuation process. While the value of the cargo may not be the entire basis of the insurance contract, as a material part of the description, it must be acknowledged to be part of that basis. Further, courts have said that the truth of this valuation is binding on the parties. Thus, it may be argued that the decision as to whether the valuation is based on contract or estoppel depends on which part of the transaction is referred to. The valuation itself is contractual; the enforcement of the valuation is by estoppel.

The defect in this explanation is that it assumes that the valuation is in fact enforced on the parties in the adjustment of a loss. This is not the case. As the court pointed out in *International Navigation Company v. Atlantic Mutual Insurance Company*, the policy valuation plays no part in the settlement of the loss.[59] The valuation purports to fix the gross departure value of the cargo. The only total value used in the adjustment is the gross arrival value, and this is used only for the purpose of comparing the value of the damaged cargo to determine the proportion of loss. The only other figure used is the amount of insurance and, while the maximum amount of insurance is fixed by the valuation, the two are not necessarily the same. So far as the adjustment of partial losses is concerned, the only effect of the valuation is to preclude inquiry by the parties into the insurable interest of the assured.[60]

A comparison of the adjustments of valued and open policies may clarify this slightly. In a valued policy, the insurer's liability on a partial loss is computed by multiplying the amount of insurance by the proportion of loss. In an open policy, the liability is also computed by multiplying the amount of insurance by the proportion of loss, *so long as the insurable interest of the assured is equal to, or greater than, the amount of insurance.*

While the practice of individual assureds and underwriters may vary, the valuation in a marine policy, reduced to its essentials, is nothing more than an agreement between the parties that the adjustment shall be made without inquiry into the insurable interest of the assured. The valuation process may involve nothing more than this: The shipper suggests a valuation sufficient to enable him to purchase the insurance he desires; the underwriter agrees, provided the amount does not seem too far out of line. The frequent practice of underinsurance suggests that the valuation is not conceived of by either party as a representation of fact, but merely as an agreement as to how the adjustment of the loss shall be conducted.

This analysis is not new. It will be recalled that in *Lewis v. Rucker* the plaintiff argued that a valued policy was a wager

[52] Cited at footnote 17.
[53] Cited at footnote 5, at p. 753.
[54] Cited at footnote 3, at p. 712.
[55] Cited at footnote 18.
[56] Bigelow, *A Treatise on the Law of Estoppel* (6th Ed., 1913), p. 495.
[57] 21 Corpus Juris, "Estoppel" Sec. 110 (1920).
[58] *Hoogendorn v. Daniel*, 178 F. 765, 768 (CCA-9, 1910).
[59] Cited at footnote 7, at p. 324.
[60] Note that while the insurable interest may be the same as prime cost or the amount of insurance, it is not necessarily identical with either of these figures.

policy, like an interest-or-no-interest policy, and that for this reason an adjustment could not be based on that valuation. Recognition that the valuation was not conceived of by the parties as an expression of actual fact is implicit in such an argument.

It is suggested that, while the abuses of the device made it necessary to prohibit it by statute, the interest-or-no-interest policy served a useful purpose when used in a bona-fide insurance transaction. It simplified both the formation of the insurance contract and the payment of losses under it. This simplification may well have been even more desirable when accounting systems were more rudimentary than they are today. The valued policy first appeared in litigation shortly after 1741, when interest-or-no-interest policies were prohibited by statute.[61] While its use appears to have been common by the time the early cases were tried, it is possible that, whether or not its origin was due to the prohibition of interest-or-no-interest policies, its growth may well have been promoted by this prohibition.

Therefore, it seems clear that the legal basis of the valuation is not estoppel. The valuation is not a representation of fact which is subsequently enforced on both parties out of considerations of equity. It is an agreement as to how the adjustment of a loss will be conducted, and this agreement is enforced as part of the contract between the parties. In the *Gulf Refining Company* case, the Court came very close to this conclusion when it stated that the valuation "is . . . a stipulation . . . that for purposes of computation of the insurance liability the cargo shall be taken at an agreed value."[62] As has been indicated, it is not true that the cargo is taken at the agreed value for purposes of computing the insurance liability, or even that the agreed value plays any part at all in that computation, but the court is correct in conceiving of the valuation as a stipulation regarding the manner in which the insurer's liability shall be computed rather than as a representation of fact.

If it is true that valuation is basically a device for the settlement of losses rather than a representation of fact, it seems appropriate to evaluate it as a settlement device, and to inquire whether a better method may be devised. The established rule for the adjustment of partial losses on valued cargo policies is easily misunderstood. It appears to impose a penalty against the shipper because it fails to recognize that an agreed valuation, honestly and accurately made, may yet differ from the value of the shipment at the port of delivery. The insurer's liability is computed by the following formula:

$$\frac{\text{amount of damage}}{\text{sound gross arrival value}} \times \text{amount of insurance.}$$

Obviously, this may be restated as: $\text{amount of damage} \times \frac{\text{amount of insurance}}{\text{sound gross arrival value.}}$

This is the same as coinsuring on the basis of the gross arrival value. In other words, although the valuation fixed the maximum amount of insurance the shipper might buy and although the shipper may have been fully insured according to the valuation, part of his loss is not paid upon adjustment. To limit the amount of insurance which may be purchased by one value and yet to compute coinsurance on the basis of a different—and usually higher—one seems unfair, especially in view of the frequently encountered misconception of coinsurance as a penalty enforced against the insured.

Of course, this is incorrect. Coinsurance is not a penalty, but a device for establishing, in any loss, the amount of that loss which the assured consented to bear. The justification for computing coinsurance on the basis of the gross arrival value is that the amount of loss is also computed on that basis. Thus, the loss includes a proportionate part of the difference between the gross departure value and the gross arrival value. The result is indemnity on the basis of the valuation, which was the intention of the parties.

Far from confusing the gross arrival value and the gross departure value, the tradi-

[61] See footnote 16.

[62] Cited at footnote 3, at p. 712.

tional rule actually differentiates clearly between them and is an accurate device for making losses computed on the basis of the former correspond to the latter. Thus it would appear that if indemnity is conceived of as placing the assured in the position he would have occupied had the venture not been undertaken, the traditional rule affords a means of obtaining complete indemnity.

However, if indemnity is conceived of as placing the shipper in the position he would have been in had the venture been completed successfully, the present method of adjustment can, at best, only approximate the desired result. The components of the gross departure value and gross arrival value already have been discussed. It will be recalled that the only element, in addition to those included in the gross departure value, which is involved in the gross arrival value, is the profit arising from the state of the market. Since it is possible under the present practice of the insurance industry to purchase insurance on the profit to be realized on the shipment of a cargo, in either a valued or open policy,[63] it is possible at least to approximate the desired result.

However, this is at best only an approximation. The insurer's liability under the present practice is necessarily limited by the amount of insurance, with the result that the proximity of the loss adjustment to the loss of profits actually experienced by the assured is determined by the accuracy of the original estimate of profits, as that estimate is reflected in the amount of insurance, including profits insurance, purchased. To go beyond this approximation would require adjusting the marine policy as if it were an "actual cash value" policy, in that the limit of the insurer's liability would not be fixed when the policy was issued. If the parties were to agree, there would appear to be no legal reason why the present marine insurance policy could not be adjusted on an "actual cash value" basis, the valuation and amount of insurance serving only to establish the extent to which the assured was a self-insurer.[64] Practically, the problems presented by such a method of adjustment are imposing. Adjustment on an "actual cash value" basis is used in some parts of automobile and inland marine insurance,[65] but it would appear to be ill-suited to marine insurance, where the losses are relatively less frequent and more severe. Moreover, granting that adjusting on an "actual cash value" basis does not require the insurer to insure the market price of the goods, it is nevertheless true that such a method of adjustment does involve the underwriter in the market to a considerable degree.[66] The underwriter, called upon to insure a variety of cargoes at their values on arrival in ports all over the world, might well find the task impossible, even with a multitude of rate-making and market services to assist him. Further, since insurance on cargo is frequently purchased by the exporter for the benefit of the importer,[67] this whole insurance transaction would probably be carried on without any direct contact between the underwriter and the importer, thus depriving the insurer of the opportunity of discussing the valuation with the assured. Since insurance to the amount of this valuation would make the insurer liable for the full amount of the loss, even if the sound gross arrival value should exceed the valuation, the danger of making the valuation on the basis of inadequate information is obvious. These problems are merely illustrative of the serious problems which would be presented.

Conclusion

The established rule benefits from a full and accurate statement in the more recent decisions. In the earlier decisions, while the statement of the rule may have been inaccurate, many of the side issues and conceptual problems inherent in it have been discussed and resolved. The result is an extremely helpful body of case law, which ought not to be abandoned. In most respects, the operation of the rule in practice is fully satisfactory. Even assuming a desire on the part of the insurance industry to improve its operation, there would seem to be little reason for going outside the framework of its basic principles. **[The End]**

[63] Arnould, volume cited at footnote 20, at pp. 224-229; Vance, *Insurance* (3d Ed., 1951), p. 914.

[64] It will be recalled that such a method of adjustment was used by the trial court in the *Fay* case.

[65] Inland marine insurance covers mainly movable chattels and means of transportation and has no functional relationship to marine insurance, despite the similarity of name. See Vance, work cited at footnote 63, at p. 34.

[66] This problem was discussed by the courts in *Lewis v. Rucker* and *Natchez Insurance Company v. Bruckner*.

[67] Kennedy, *Contracts of Sale C. I. F.* (2d Ed., 1928), pp. 77-110; Thayer, "C. I. F. Contracts in International Commerce," 53 *Harvard Law Review* (1950) pp. 792, 804-806.

Professional Liability Problems of the Medical General Practitioner

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THE TITLE of this article would indicate that there are problems peculiar to those physicians doing what is termed "general practice." Actually, such statistical reviews as are presently available would show that there is probably no significant difference between incidence of professional liability claims for general practitioners and the incidence for specialists. Indeed, it has been demonstrated by a nine-year analysis of claims originating from a large county in California that there is no significant difference between the incidence of claims against the general practitioner and the American Board-certified specialist.[1]

The difference in the incidence of professional liability claims as between specialists, board specialists and general practitioners, as demonstrated by research, appears to be determined by the type of medical or surgical work undertaken by the physician. It is clear, as will be outlined below, that surgical procedures are clearly more hazardous than medical treatment. Where these differences are, and how they apply to the general practitioner, will be the substance of this article.

Definitions

The term "medical malpractice," while widely and commonly used, is not proper in this day and age and is not truly synonymous with the term "professional liability." Medical malpractice, in the author's philosophy, connotes actual, deliberate negligence or ignorance on the part of a physician. Professional liability is currently a more proper term, since it includes those claims arising from complications due to the honest, human error of the physician which he could have prevented had he been more astute or observing. Professional liability also includes the greater majority of suits and claims, probably 90 per cent or more, which are without merit and are due to the unrealistic attitude or misunderstanding on the part of the patient. Further, the term indicates that the physician is faced with an occupational hazard, increasing with considerable rapidity since World War II.

Who and what is the general practitioner? While we all have a good idea of what a general practitioner is, the term itself is not easy to define. Indeed, the California Academy of General Practice has found definition difficult. Perhaps the general practitioner is best defined negatively as a physician who does not limit his practice to a single and particular field of medicine. Another definition, on the positive side, is that the general practitioner is a physician who takes the responsibility for the patient as a whole. However, this is in conflict with the definition of the internist who, while he does no surgery, takes pride in the fact that he surveys the patient in entirety and calls in for his surgical procedures those physicians who are ably qualified in that field.

At any rate, for the purpose of this presentation, we may say that the general practitioner is a physician who does not limit his practice to any one given field of medicine, though he may exclude one or several types of medical or surgical work. Finally, the general practitioner will generally refer patients or secure consultation in very highly specialized or unusually difficult medical or surgical problems which are beyond his ability to diagnose or treat.

[1] Sadusk, "Analysis of Professional Factors in Medical Malpractice Claims," 161 *Journal of the American Medical Association* 442 (1956).

Standard of Care

While the law requires the physician to apply to his patient the same diligence and standard of care as exercised by other physicians in his locality, the specialist is held to a more expert type of professional care in his restricted field than is the general practitioner. On the other hand, this does not mean that there is a dual standard of care. In other words, the general practitioner who embarks upon treatment of a patient should be able to perform that treatment or surgery as well as the average physician in his area, whether general practitioner or specialist. The difference in standard of care applies to those unusually difficult medical or surgical cases which fall in the province of the specialist. It is likewise clear that the standard of care will necessarily differ from one locality to another. In a metropolitan area, where the general practitioner has free recourse to ably qualified specialists, it is of course wise that he refer special medical or surgical problems to those specialists who possess unusual qualifications. In a rural area, where such specialists are many miles away and it is not possible to carry out such referrals for diagnosis, treatment or surgical procedures, the general practitioner must obviously carry along to the best of his ability.

Hazardous Fields of Medicine

It is important to note that the particular hazard to which the general practitioner is exposed is essentially the sum total of all fields of medicine, since the general practitioner ordinarily practices within all the various fields of medicine. In this respect, the general practitioner's hazard is different from other physicians who practice in a specialty field; the general man's professional liability problems consequently encompass the entire field of medicine and surgery, and the problem should be reviewed in this respect.

It is becoming more and more clear that special fields of medicine are particularly hazardous and result in an unusually high incidence of professional liability claims against the physician. A recent statistical review[2] of such claims in a county in California, with urban and semirural characteristics, would indicate that these problems are mainly surgical in nature. This particular study noted that 68 per cent of serious claims and suits filed against physicians were surgical in nature. Medical incidents constituted 18.4 per cent, principally toxic drug reactions. Radiological claims and suits were 2.4 per cent of the total, and equipment claims such as diathermy, heat lamps and Bovie burns accounted for 5.6 per cent. A miscellaneous group of other types of claims totaled 5.6 per cent.

The breakdown of the surgical claims revealed the very interesting fact that obstetrics and gynecology had emerged as the most important field in professional liability. Orthopedics (heretofore first in the field) was second, and general surgical problems were third. The remaining surgical subspecialties were scattered in small percentages to complete the surgical claims.

A review of other factors was also made, clearly showing that the age and sex of the physician, the locality in which he practiced and whether he was a general practitioner or specialist played no important role. Indeed, a breakdown into the subdivisions of type of practice, with the general practitioner compared with the American Board-certified specialist or even the noncertified specialist, revealed no statistically significant difference among the groups. Consequently, it is quite clear that the general practitioner's particular hazard in the field of medical malpractice will be encountered when he performs surgery.

Where are other particularly hazardous fields of medicine? If one surveys carefully the surgical fields which are particularly likely to bring on claims, it is noted that diagnostic surgical procedures carry more hazard than the usual reparative or curative surgery. The performance of the aortogram and other types of angiography, myelograms, cisternal punctures, needle punch biopsies, cosmetic plastic surgery, and potentially scarring dermatological procedures are particularly important.

As previously noted, the field of obstetrics and gynecology, while seemingly nonhazardous, has emerged in our study as a leading factor due especially to severed ureters and vesicovaginal fistulas following hysterectomy. While such complications are, of course, necessary hazards to operations of this type, the malpractice charge may have merit if the reasons for the performance of the hysterectomy are inadequate. This is logical, since the complication would not have occurred if the operation had not been done. In addition, there is a dual hazard in obste-

[2] Sadusk, article cited at footnote 1.

tries since the obstetrician has two potential claimants, mother and infant.

The hazard in orthopedics is due to the failure to secure X rays of the appropriate parts of the skeletal system even in trivial injuries, and the failure to secure post-reduction X rays to show good alignment of fragments. Another important problem is the failure to secure good functional and cosmetic results after setting a fracture.

Comment should be made upon strictly medical problems, since a good part of the general practitioner's practice is in this field. Here, it has been demonstrated that the common cause for complaint depends upon various types of sensitivity or toxic reactions to drugs, used either in diagnosis or treatment. Various diagnostic procedures, usually involving the installation or injection of organic iodine compounds, may lead to anaphylactic reactions or cause irritative phenomena leading to irreversible tissue damage, despite the most careful pretesting for sensitivity. Other important and sometimes fatal sensitivity reactions are those of the allergic type ranging from fever, rash, urticaria, lymphadenopathy, arthritis and through to the dreaded anaphylactic reaction. Such reactions may even be had with seemingly nontoxic agents such as aspirin and thiamin chloride, and through to serum products and the antibiotics, notably penicillin. Finally, various potent medications may cause other types of reactions involving the blood, the gastrointestinal tract and the skin.

Complications resulting from the use of blood or blood plasma are well known and need no further comment. Finally, the relative frequency of claims against physicians for burns and injuries from diathermy and heat lamps should be emphasized, since such claims are extremely difficult to defend.

The use of X ray for therapy plays a prominent role. Here, the basic problem revolves about the need for the physician to be well qualified in this field, and to have his apparatus and equipment well metered and monitored. Severe X-ray burns may occur in such treatment without denoting malpractice on the part of the physician, since the dosage necessarily employed for curative or palliative measures may be high enough to produce such reactions and is to be looked upon as a necessary hazard. However, proof must be given of proper X-ray dosage for defense. Important aspects of other hazardous fields have been covered elsewhere.[3]

The Patient

The patient is a most important factor in professional liability claims. This point is clear, since reviews of claims against physicians indicate that approximately 90 per cent are entirely without merit and are not malpractice. Here, the patient and the attorney may be at fault, due to the fact that they do not understand that certain complications may be connected with medical or surgical procedures. Many people, including attorneys, believe that the occurrence of a complication with medical or surgical treatment is evidence of negligence on the part of the physician. This of course is far from the truth, since the physician can neither guarantee results nor can he prevent certain complications which unfortunately, though necessarily, may result. Patients should also realize that medicine is not an exact science, that diagnosis and treatment depend upon the judgment of the physician, that even if he uses all the necessary diagnostic procedures and safeguards, he may still not arrive at a good result.

In addition, it is important to note that a number of professional liability claims arise from the patient's attempt to threaten a physician in order to be released from paying a bill. This of course is not just, since the physician works on a fee-for-service basis and is entitled to be paid for his services, whether the results are good or bad. Care should be taken to make sure that the patient understands the reasons for a bad result before a bill for services is submitted.

The Attorney

The part which the attorney plays in professional liability claims and suits is an important one. While it is true that some lawyers may be avaricious and will seek to plead cases without merit, it is likewise clear that the greater proportion of attorneys are understanding and just. One important difference in philosophy between the physician and the attorney is the fact that the attorney recognizes that his duty to his client is to plead his client's case to the best of his ability. Few physicians realize this

[3] Sadusk, "Hazardous Fields of Medicine in Relation to Professional Liability," 163 *Journal of the American Medical Association* 953 (1957).

point and are, therefore, critical of the attorney. However, it is likewise clear that the attorney, before entering a malpractice claim or filing a suit, should carefully investigate the patient's allegations of malpractice and determine with expert advice as to whether or not malpractice actually exists.

That the attorney may have difficulty in securing competent medical advice and testimony is known and is due to the natural reluctance of any individual to testify against his colleague. This is true of all professional people, including doctors and lawyers. This factor of professional liability claims is yet unexplored and it may be that the future will bring forth panels of expert physicians, set up at regional levels, upon whom the attorney may call to secure an unbiased and honest opinion. Such unbiased opinions should, however, be available equally to assist the defense as well as the plaintiff.

Another honest difference of opinion between the physician and the attorney centers about the subject of attorneys' contingent fees. Here, the author of this paper and other physicians truly believe that the contingent-fee basis leads not only to the institution of nonmeritorious suits, but also to the recovery of exorbitant judgments in cases with merit which could have been justly and honestly settled without recourse to a trial. The physician finds it hard to understand why, when a $100,000 judgment is rendered against him, as much as $40,000 to $50,000 of this should go to the plaintiff's attorney. The attorney becomes a proprietor and a partner in the action. To be sure, the attorney will state that he pleads many cases without compensation because the majority of cases are lost for the plaintiff. This, however, indicates that the attorney is obviously pleading cases without merit.

It is to be hoped that some equitable adjustment of the contingent fee will be worked out in the future. No honest physician bears any resentment for having to respond to a medical malpractice claim if the claim is meritorious and deserves reimbursement. The physician is resentful, however, when a large proportion of the judgment goes not to the patient who justly deserves it, but to the patient's attorney.

Conclusion

Prevention of professional liability.—With regard to prevention of professional liability problems for the general practitioner, he must realize wherein lie the hazardous problems of medicine. He must know that the performance of any surgical procedure, particularly those in the diagnostic and exploratory group, carries a considerably higher degree of hazard than in medical fields. He should make certain that his qualifications for the particular type of surgery, or the use of toxic and dangerous medications, are proper before he embarks in these medical and surgical fields.

The physician should explain carefully to the patient, prior to embarking on diagnosis or treatment, particularly when going into the hazardous fields, that even the most careful diagnostic survey may not result in a diagnosis and that surgical procedures may lead to complications. He should warn the patient of side reactions to drugs and to X-ray or radium therapy. In certain particularly hazardous fields, he may wish to secure specific written consents and acknowledgments from the patient.

Consultation should be employed before embarking on the use of highly toxic drugs or extremely dangerous surgical procedures, and adequate consultation should be obtained when such reactions or complications occur.

Understanding of the patient and the attorney.—From the standpoint of the patient, there should be understanding on his part that untoward reactions and complications may occur and are not necessarily the fault of the physician. The patient should not be permitted to use the guise of a medical malpractice claim to keep from paying the physician's fee.

As for the attorney, he should make a careful and adequate analysis of the allegations of medical malpractice before pressing a claim or filing suit.

Finally, there should be closer liason and cooperation between the physician, the attorney and the court. Each should recognize the other's problems and attempt to work out procedures for mutual understanding and education. The contingent-fee basis of compensation for the attorney should be carefully reviewed. **[The End]**

In a traffic safety booklet, *The Road Toll,* The Travelers Insurance Companies showed that one out of every 67 Americans was killed or injured in an automobile crash last year. The total casualties were 2,563,700, the highest total in history.

Strict Liability and Social Control in Automobile Products Liability

By CORNELIUS W. GILLAM

This article will be published by the University of Minnesota Press as Chapter VI of the book entitled Strict Liability and Social Control: Products Liability in the Automobile Industry. *The article, copyrighted 1958 by Cornelius W. Gillam, is being published in this* JOURNAL *with the permission of the University of Minnesota Press.*

FOR PURPOSES of public policy, it is desirable that the automobile manufacturer bear full legal responsibility for losses caused by preventable defects in his products. Such full responsibility is called for by the nature of the losses resulting from product defects and by the economic structure of the automobile industry.

The losses incurred by the consuming public as a result of the manufacture of defective motor vehicles are the unintended and more or less inevitable concomitants of mass production and mass distribution. Dangerous manufacturing defects are quite rare in the automobile industry, in relation to total production, but where so many units are produced, some defects seemingly must occur in spite of the most rigorous quality-control measures. The losses resulting from these defects are part of the price which automobile consumers must pay for the benefits which they enjoy. The difficulty, however, is that the losses are not distributed over the consuming public proportionately with the benefits; losses are distributed by chance, so that most consumers are left untouched while a very few incur severe disutilities in the consumption of defective automobiles.

These disutilities are part of the social costs of automobile manufacture. They represent a loss or consumption of resources which have valuable alternative uses, costs which would not be incurred but for the production and distribution of automobiles. All costs are social costs, for the consumption of scarce resources for a particular purpose means that their consumption for other purposes presumably beneficial to society as a whole must be foregone.[1] When someone is killed or injured by the collapse of a defective wheel, society loses the fruits of someone's labor, a certain amount of medical care which might have been consumed elsewhere, an automobile and all the diverse resources which compose it, and so on. It outrages our sense of justice to levy these costs, attributable to the operations of a whole industry and so properly chargeable to all its beneficiaries, against isolated consumers on a random basis. To restore proportionality between the burdens and benefits of automobile consumption, the law tries to shift these individual losses to consumers as a class. The loss-shifting process consists of the imposition of legal liability upon some agency which is capable of assuming the disproportionate burden temporarily cast upon the unlucky consumer —or as much of it as money will pay for— and of redistributing the burden pro rata

[1] "Valuation is an act of conscious choice. Apart from a necessity of choosing, values have no meaning or existence. Valuation *is* a comparison of values. A single value, existing in isolation, can no more be imagined than can a single force without some other force opposed to it as a 'reaction' to its 'action'. Value is in fact the complete analogue of force in the interpretation of human activity, and in a behaviouristic formulation is identical with force—which is to say, it is an instrumental idea, metaphysically nonexistent. Fundamentally, then, the cost of any value is simply the value that is given up when it is chosen: it is just the reaction or resistance to choice which makes it choice. Ordinarily we speak of cost as a consumption of 'resources' of some kind, but everyone recognizes that resources have no value in themselves; that they simply represent the products which could have been had by their use in some other direction than the one chosen." Frank H. Knight, "Fallacies in the Interpretation of Social Cost," *The Ethics of Competition and Other Essays*, Ch. VIII, p. 225 (reprinted from 37 *Quarterly Journal of Economics* 582 (1924)).

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among those who enjoy the benefits to which it is incidental.[2] Accordingly, we impose products liability (however imperfectly) upon the automobile manufacturer, and leave it to him to reckon his money costs, adjust his prices, and recoup his outlays (ultimately) from the consuming public for whose benefit they are made.

This means that the economic function of a legal action for compensatory damages is to restore proportionality in the distribution of the benefits and burdens of production. To conceive of damages as compensation is simply to accept (or to confirm) marginalism in production and distribution theory and, from the business manager's viewpoint, to recognize the social desirability of equating accounting costs with social costs. Where the social costs of a particular productive process are not fully reflected in the entrepreneurial income statement, an unearned benefit accrues; that is, the entrepreneur is being subsidized to the extent that productive factors are incompletely compensated. Conversely, the entrepreneur is inequitably taxed if the social benefits of his activity are imperfectly recognized by the revenue generated. It is the implicit objective of the law, and indeed of the whole system of social control, to equate private with social costs and revenues and so to preserve rational yet impersonal resource allocation. Workmen's compensation and absolute liability for blasting represent simple types of examples of a principle which becomes universal when jurisprudence rejects vengeance for compensation.[3]

If products liability law is to be justified in terms of its success in socializing risks, that is, in shifting from particular consumers to consumers in general the losses resulting from preventable but inevitable product defects, the question may well be raised whether existing forms of insurance might not perform the risk-shifting function more simply and economically. It seems probable, however, that in the automobile industry, existing forms of insurance contracts will not prove desirable substitutes, from a risk-shifting viewpoint, for the common law rules as they presently stand. The various statutes and proposals imposing liability without fault and requiring compulsory insurance for the most common type of automobile accident, that now said to be caused by drivers' "negligence," offer solutions to a comparable (though distinct) problem, for which solutions, no doubt, there is much to be said.[4] The principal justification for compulsory insurance in the driver-fault situation is the protection of the public from uncompensable injury at the hands of judgment-proof drivers. Here insurance gives practical economic significance to rules of law. When we turn to the manufacturer-fault situation, however, financial irresponsibility (in the automobile industry) ceases to be a problem. The prospect of an injured consumer being thwarted in an action against an automobile manufacturer by the defendant's inability to satisfy a judgment is so remote that for practical purposes it may be ignored. Automobile manufacturers are well able to insure themselves against products-liability claims; they prefer to insure themselves; this pref-

[2] See F. C. Underhay, "Tort Liability of Manufacturers," 10 *Canadian Bar Review* 615, 620 (1932); Reed Dickerson, *Products Liability and the Food Consumer* (1951), pp. 269-284; Lester W. Feezer, "Ability to Bear Loss as a Factor in the Decision of Certain Types of Tort Cases," 78 *University of Pennsylvania Law Review* 805 (1929); Roscoe Pound, "Economic Interpretation and the Law of Torts," 53 *Harvard Law Review* 365 (1940); Note, Impact of the Risk Theory on the Law of Negligence," 63 *Harvard Law Review* 671 (1950); Karl N. Llewellyn, "On Warranty of Quality and Society, II," 37 *Columbia Law Review* 341, 407 (1937).

[3] For discussion of the problem of equating social and accounting costs, see Karl W. Kapp, *The Social Costs of Private Enterprise* (1950).

[4] See Note, "Compensation Problems Created by Financially Irresponsible Motorists," 66 *Harvard Law Review* 1300 (1953).

erence is based upon legitimate reasons; risk-shifting is not restrained by self-insurance under these circumstances; and there is no reason for society to interfere further.

A more likely possibility, but one which also should be rejected, is compulsory insurance to be carried by *drivers*. Ordinarily we require insurance of potential defendants, not of potential plaintiffs, but if the justification of absolute liability for product defects is its efficacy in shifting losses from particular plaintiffs to the consuming class which includes all potential plaintiffs, there is no reason, so far as the insurance theory itself is concerned, why analytically identical results could not be reached by requiring consumers to insure themselves for their own protection. This is not uncommon, of course, on a voluntary basis, at the present time. But to compel drivers to insure themselves against product defects not attributable to their own misconduct would carry interference with liberty of contract to a rather extreme point (how would consumers react even to compulsory fire insurance?), would add nothing to the protection already afforded consumers by actions against defendants whose resources may exceed those of insurance companies, would encourage fraudulent claims and excessive verdicts, would add nothing to the manufacturer's incentives to maintain product quality, would diminish the manufacturer's opportunity to defend the reputation of his goods, and would do nothing to simplify the difficult questions of proof which bring most automobile products-liability cases into court and so would not reduce the volume of litigation. Above all else, the rate-making problem would be practically insurmountable, since genuine product defects are so relatively rare a cause of automobile accidents as to deprive insurers of a meaningful basis in experience for rate-making. Whatever may be the case in other industries, automobile products liability seems better suited to legal than to contractual risk-shifting.

The economic structure of the automobile industry is such as to facilitate the development of rules of law implicitly designed to socialize the privately incurred costs or burdens incidental to the production and distribution of public benefits. Here, to a far greater degree than in the food industry, for example, there is a particular locus of responsibility which will socialize the private costs of public benefits better than any other. This locus of responsibility is the manufacture or assembly of finished automobiles. It is at the manufacturing stage in the process of production and distribution that we find a very few large and solvent firms which are fully capable of making the cash outlays necessary to compensate the consumer's disproportionate costs and of redistributing these liquidated costs pro rata among the vast consuming public or of shifting them backward to be assessed against that stage of the productive process to which they are properly chargeable. There is a legion of suppliers and dealers and a host of consumers, but a mere handful of automobile manufacturers, and it is the automobile manufacturers who dominate the industry and make its crucial entrepreneurial decisions. The manufacturer is the strategic bottleneck in the risk-shifting process, and accordingly, it is the manufacturer upon whom legal liability tends to be focused.

This suggests that products liability is not a fixed idea but, like most legal concepts, means different things for different purposes. The rules of products liability tend to be influenced by the structure of the industry to which they refer, so that products liability in the automobile industry is not quite the same thing as products liability in, for example, the food industry. The automobile industry's closer integration puts the products-liability emphasis on the manufacturer. The retailer's liability is relatively unimportant and usually is disclaimed. In the food industry, on the other hand, retailers are structurally much more significant. Indeed, large retailers may be the dominant elements in the total process of manufacture and distribution. The entire industry is characterized by keen competition among a large number of relatively small units. Disclaimers are rare. The consumer often must buy sight unseen. It is technically more difficult to maintain constant quality, and the consequences of failure to do so are more obvious. Deficiencies of quality may be easier to prove, but recovery is more likely to be impeded by the financial irresponsibility of defendants. Under these circumstances it is not surprising that, for example, products-liability insurance plays a significant role, and that the retailer's warranty is a more useful weapon in the plaintiff's arsenal.

The immediate economic objective of products liability in the automobile industry is to impose upon the manufacturer the social costs attributable to manufacture. Our society still is individualistic enough to insist that some costs intimately related to

manufacture, but "proximately" caused by such foreseeable factors as the plaintiff's contributory negligence, are *not* properly attributable to manufacture. But once the cost *is* charged against the manufacturing process, the pertinent rules of law must be appraised in terms of their success in imposing liability upon the manufacturer. The question, then, is how complete the manufacturer's liability is made by the rules of law studied here, and how the gaps in his liability may be closed most effectively.

By and large, the tort liability of automobile manufacturers is about as complete as it can be made. The negligence cases have carried the *MacPherson*[5] rule to the point where a practical strict liability is approximated, although the surviving notions of "duty" and "foreseeability" certainly do not simplify the application of the rule. The perspective of nearly four decades helps us to see that the *MacPherson* decision tended to perpetuate the privity rule by working within its exceptions, although, of course, the time was not ripe for a more sweeping reformulation of the manufacturer's liability.[6] Cardozo's *MacPherson* opinion seems to lose some of its originality when it is compared with the Appellate Division's opinion,[7] the district court's opinion in the *Cadillac* litigation,[8] and the *Olds*[9] and *Quackenbush*[10] cases. But this may mean simply that we have come to take *MacPherson* for granted; we are as smug about it as the English courts once were about *Winterbottom v. Wright*,[11] and current concern with its further development takes the form of debate about evidentiary standards and the troublesome doctrine of *res ipsa loquitur*. In the rare case where it is applicable, the action of deceit, though prevented by the requirement of *scienter* from developing into liability without fault through the legal

By and large, the tort liability of automobile manufacturers is about as complete as it can be made.

fiction of "innocent misrepresentation," effectively shifts the consumer's loss to the manufacturer.

Most students of products liability favor rationalization of the tort side of the problem in terms of liability without fault.[12] The explicit adoption of strict liability certainly would simplify matters considerably and seems desirable for this practical reason, but it is doubtful that the actual results of litigation would be significantly affected by such a development. Absolute liability puts the issue purely in terms of the existence of a defect and its causal relation to the plaintiff's injury, but the fact is that the issue of causation is the essence of the negligence actions. Liability without fault focuses attention on the issue of causation as the touchstone of liability, but it doesn't eliminate causation as an issue, and if the plaintiff can prove causation, he is almost certain to recover under the *MacPherson* formulation of liability for negligence. Liability without fault would simply confirm what already has been achieved.

In warranty, the liability of the automobile manufacturer still is fragmentary. Unless fictions are resorted to—and the courts so far have refused to resort to fictions in the automobile cases—or reliance is placed upon representations of quality expressed in advertising, the privity requirement still rules the warranty cases and prevents recovery, except through circuitous actions,[13] in the typical case in which the consumer and the manufacturer do not deal with one another.[14] Furthermore, the Uniform Sales

[5] *MacPherson v. Buick Motor Company*, 217 N. Y. 382, 111 N. E. 1050, L. R. A. 1916F 696, Ann. Cas. 1916C 440 (1916), aff'g 160 App. Div. 35, 145 N. Y. S. 462 (1914).

[6] Compare, and contrast the influence of, opinions such as those of Brett, M. R., in *Heaven v. Pender*, 11 Q. B. D. 503 (1883), and the Virginia court in *Standard Oil Company v. Wakefield's Admr.*, 102 Va. 824, 47 S. E. 830, 66 L. R. A. 792 (1904).

[7] 160 App. Div. 35, 145 N. Y. S. 462 (1914).

[8] *Johnson v. Cadillac Motor Car Company*, 194 F. 497 (1912).

[9] *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (n. s.) 560, Ann. Cas. 1913B 689 (1911).

[10] *Quackenbush v. Ford Motor Company*, 167 App. Div. 433, 153 N. Y. S. 131 (1915).

[11] 10 M. and W. 109, 11 L. J. Ex. 415, 152 Eng. Rep. 402 (1842).

[12] See Gillam, *Strict Liability and Social Control: Products Liability in the Automobile Industry*, Ch. III.

[13] Privity and circuity are, of course, opposite sides of the same coin. See Reed Dickerson, article cited at footnote 2, at pp. 134-142.

[14] Professor Leidy argues that there are two and only two bases of tort liability: fault, and the creation of an unreasonable risk. Only the latter justifies liability without fault, he says, and accordingly he concludes that decisions such as *Baxter v. Ford Motor Company*, 168 Wash. 456, 12 Pac. (2d) 409, 88 A. L. R. 521 (1932), impose an unjustifiable liability without fault, since the risk created by the manufacturer is not unreasonable. Leidy thinks that the manufacturer should be held to have warranted only that the vehicle is free from *discoverable* defects: the test of liability, as in *Olds Motor Works v. Shaffer*, cited at footnote 9, then becomes not the truth of the representation, but

Act presents manufacturers with a standing invitation to contract themselves out of warranty, if not out of all, liability.

The ultimate solution of the legal aspect of the problem of products liability is twofold. First, the privity impasse can be sidestepped in the warranty cases, and the tort cases can be further simplified (together with the explicit adoption of liability without fault) simply by holding that the manufacturer is in fact in privity of contract with the consumer-purchaser. All the strained attempts to evade the privity rule may be avoided simply by a frontal attack on the privity rule itself. This would eliminate the present differences between tort and warranty liability, and would be quite consistent with the economic realities of the situation: The dealer is merely a conduit, or an agent of the manufacturer in economic fact if not in legal theory. The dealer is the manufacturer's vehicle for dealing with the consumer; the manufacturer really controls the dealer and, in any case, communicates directly with the consumer through all the mass media. The manufacturer directly urges the consumer to buy and addresses his standard warranty directly to the consumer, with whom he often deals person to person in the event of a claim or complaint. Whatever the merits of the privity rule itself, it is ridiculous in this situation to say that privity does not exist.[15] By thus eliminating the privity barrier, both warranty and tort liability can be put on the simple basis of causation,[16] following the lead of the Restatement,[17] the latest tort cases[18] and the civil law.[19]

A products liability based upon causation would not, however, significantly advance the ultimate limits of liability beyond lines already drawn. Its chief contribution would be a general clearing of the air and a basis for logical reformulation of existing confusion. Liability still would depend upon the answers, in a particular action, to two questions: (1) Was the vehicle actually defective? (2) If so, was the defect the proximate cause of the plaintiff's injury? Proof of the defect is the most difficult of these hurdles, and the question of relaxation of applicable standards of proof, and particularly of refusing to limit the doctrine of *res ipsa loquitur* to cases in which the vehicle is exclusively within the defendant's control *at the time of the accident*, remains crucial to significant further extension of plaintiffs' law. Logical reformulation of the existing rules is a condition precedent to consideration of this ultimate question.

But this would deprive the consumer of his last defense against the disclaimer contained in the manufacturer's standard warranty: the proposition that the manufacturer is not in privity of contract with the consumer, and that therefore the contractual limitation of liability is ineffective between them,[20] leaving the consumer his right to sue the manufacturer in tort. Accordingly, the entire question of public policy relating to contractual disclaimers of liability must be reconsidered, with a view to preserving as much freedom of contract as is consistent with the availability of meaningful economic alternatives to consumers, but nevertheless making such alternatives available at all costs. Doubtless some legislative regulation of disclaimers, as proposed by all students of the disclaimer problem,[21] is in order. When,

(Footnote 14 continued)
the exercise of reasonable care in making it. The result is "no liability without fault." The cost-socializing rationale of products liability, on the other hand, means that liability should not be so limited, but should follow from the creation for profit of *any* risk which in fact results in the assumption by the plaintiff of a disproportionate part of the aggregate social cost of public enjoyment of the consumption of motor vehicles. The criterion of liability, under this analysis, is not the legalism of due care, but sound economic policy. See work cited at footnote 12, at Ch. IV; Paul A. Leidy, "Another New Tort?—Liability of Manufacturer of Automobile for Non-Negligent Defect," 38 *Michigan Law Review* 964, 974-978 (1940).

[15] See Charles Keating Rice, "Liability of a Manufacturer to a Sub-Vendee," 18 *Cornell Law Quarterly* 445, 451 (1933); A. E. Steensland, "Liability of the Manufacturer to the Ultimate Consumer Under Modern Merchandising Practices," 9 *Montana Law Review* 101 (1948); George G. Bogert and Eli E. Fink, "Business Practice Regarding Warranties in the Sale of Goods," 25 *Illinois Law Review* 400, 416 (1930).

[16] See Paul A. Leidy, "Tort Liability of Suppliers of Defective Chattels," 40 *Michigan Law Review* 679, 685 (1942).

[17] Restatement, Torts (1934 and 1948 Supp.), Sec. 395.

[18] See work cited at footnote 12, at Ch. IV.

[19] Note, "Sales—Warranty of Quality—Liability of Manufacturer to Sub-Vendee for Breach of Warranty," 14 *Tulane Law Review* 470 (1940); Clarence J. Morrow, "Warranty of Quality: A Comparative Survey," 14 *Tulane Law Review* 327, 529 (1940). Louisiana Civil Code, Art. 2315: "Every act whatever of man which causes damage to another, obliges him by whose fault it happened to repair it."

[20] *Ford Motor Company v. Switzer*, 140 Va. 383, 125 S. E. 209 (1924).

[21] See George G. Bogert and Eli E. Fink, article cited at footnote 15, at pp. 413-417; Karl N. Llewellyn, article cited at footnote 2, at pp. 384-388, 408, 409; J. Robert Gotch, "Contractual Disclaimers of Warranty," 22 *Washington University Law Quarterly* 536 (1937); James A. Spruill, Jr., "Privity of Contract as a Requisite for Recovery on Warranty," 19 *North Carolina Law Review* 551 (1941).

as in the *Shafer* case,[22] a court can say that the consumer is free to buy elsewhere if he doesn't like a particular seller's terms, though the court knows that the terms of all sellers are identical, legislative intervention seems clearly indicated.[23]

Formal adoption of liability without fault, total abandonment of the privity defense in contract as well as in tort actions, and legislative regulation of disclaimers sufficient to preserve meaningful economic choice certainly would do a great deal to convert civil actions for damages into more effective devices for the socialization of costs through the spreading of risks of injury from defective products. It does not necessarily follow, however, that a lawsuit is the consumer's most effective protection against money losses resulting from such injury. Even if a broader basis of liability eliminates the distinction, meaningless to the injured plaintiff, between loss due to negligence and loss due to chance, it still is true that the delay, expense and agony of litigation leaves the generally high standard of performance of the automobile manufacturers, and their interest in improving the quality of their products still further, as the ordinary consumer's brightest hope.

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Modern products-liability law, not only in the automobile industry but generally, has gone far in bringing about that shifting of risks in sales transactions called for by the conditions of modern industrial society.

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He knows that defective vehicles reach consumers only relatively rarely, and that when they do, the manufacturers tend to treat the consumer liberally in order to keep his good will, in spite of the fact that the disclaimer may relieve the manufacturers of any obligation to do so. Competition and technological advance thus reduce the consumer's risks still further, although he may wish that more attention were given to the design of automobiles for the primary purpose of affording maximum protection to the passengers in case of accidents of any kind.

But neither rules of law nor enlightened business practice is likely to convert the retail purchase of an automobile into a

[22] *Shafer v. Reo Motors, Inc.*, 108 F. Supp. 659 (DC Pa., 1952), aff'd, 2 Negligence Cases (2d) 438, 205 F. (2d) 685 (CA-3, 1953). The district court said, at p. 661, that "There is no rule of public policy which invalidates provisions limiting liability for negligence, or otherwise, as between the buyer and the seller. The buyer is under no compulsion to buy from the seller and, if the buyer desires to buy from the seller, the buyer has a choice of accepting the seller's terms or going elsewhere." This simply ignores the fact that the buyer cannot get different terms if he goes elsewhere, since all automobiles are sold under a standard warranty disclaiming all liability other than the obligation to supply replacement parts within 90 days or 4,000 miles at the discretion of the manufacturer. See George G. Bogert and Eli E. Fink, article cited at foonote 15, at pp. 400, 413.

[23] As Professor Llewellyn puts it, "a law of quality gradually adjusting itself to the mutual relations of merchants may be a tricky tool for the protection of the ultimate distributee; . . . the changes needed to increase its utility as between merchants . . . and those needed to protect the consumer-for-use . . . may prove to be wholly different changes." Karl N. Llewellyn, article cited at footnote 2, at pp. 699, 721. See Richard A. Rosenberger, "Sales Contracts—Warranty—Liability on Warranty Clause Made in Lieu of All Other Expressed or Implied Warranties, Obligations or Liabilities" (noting *Shafer v. Reo Motors*, 205 F. (2d) 685 (CA-3, 1953)), *27 Temple Law Quarterly* 363 (1954). Rosenberger suggests that contractual limitations of tort liability, whether disguised as "warranties" or not, may be avoided on the grounds (1) that there is an exception to the general rule that such disclaimers are valid in cases in which the parties do not stand on equal footing, (2) that contractual disclaimers of tort liability are contrary to public policy, or (3) that Sec. 2-302 of the Uniform Commercial Code, prohibiting enforcement of "unconscionable" contracts or parts of contracts, may be invoked to remedy the injustice. It should be noted that Sec. 2-316 of the Uniform Commercial Code permits disclaimers of express and implied *warranties*, but says nothing concerning disclaimers of tort liability. Section 15(6) of the Second Draft (1941) of the Revised Uniform Sales Act voided disclaimers of implied warranties "if the circumstances indicate that a reasonable person in the position of the buyer would, despite such general language, be in fact relying on the merchantable quality of the goods or their fitness for a particular purpose." This received scholarly approval (see William L. Prosser, "The Implied Warranty of Merchantable Quality," 27 *Minnesota Law Review* 117, 165 (1943)), but, of course, did not touch disclaimers of tort liability, and the Uniform Commercial Code as finally proposed does not go even this far. Of course, it may be argued that the disclaimer problem really is not very serious, inasmuch as serious defects are relatively rare in proportion to total vehicles manufactured, and the manufacturers usually adopt the policy of satisfying the customer even if the warranty has expired. The one-year, 12,000-mile adjustment policy which the manufacturers adopt for the purpose of handling claims made after the standard warranty has expired illustrates this policy. It must be remembered, however, that nothing is said to the consumer about the existence of any such adjustment policy, so that in practice it applies, discriminatorily, only to those persistent claimants who insist upon satisfaction after they know that the manufacturer's obligations under the warranty have expired.

transaction which insures the consumer against the unfortunate possibility that he may involuntarily be assessed a disproportionate part of the aggregate cost of maintaining the automobile industry. Accidents still happen, lawsuits still are cumbersome, and the manufacturer's voluntary generosity cannot always be safely assumed. Under these circumstances, "a refined *caveat venditor* still means that purchase is a game of chance." [24]

This does not mean, however, that the total development of products-liability law since *Winterbottom v. Wright* [25] has not significantly reduced, from the consumer's viewpoint, the risk that a particular purchase will carry with it a vastly disproportionate share of the cost burdens of manufacture. Certainly modern products-liability law, not only in the automobile industry but generally, has gone far in bringing about that shifting of risks in sales transactions called for by the conditions of modern industrial society. Yet it cannot be emphasized too strongly that this risk-shifting process, however natural and desirable it may seem to the mid-twentieth-century student of jurisprudence, is bottomed upon and limited by two fundamental conceptions: the idea that products liability follows only from a "defect" in the goods purchased, and the idea that even if a "defect" is proved, liability results only if the "defect" is the "proximate cause" of the plaintiff's injury. Goods do not have to be "defective" to be dangerous, and the idea of proximateness is a quite significant qualification of the idea of causation. Even the modern law is capable of dealing only with the direct results of ultimate facts, and in practice this means that our society still accepts the principle of *caveat emptor* as an appropriate justification for the results of a large class of cases.

One of the most interesting of recent products-liability decisions, *Hentschel v. Baby Bathinette Corporation*,[26] strikingly illustrates the extent to which the consumer still is required to assume the risk of extraordinary consequences of purchase, notwithstanding the extensive incursions into the principle of *caveat emptor* made by a legion of cases marching through the past century in an increasingly successful campaign for *caveat venditor* in foods, automobiles, and a long list of processed and manufactured goods.

In effect, the *Hentschel* decision summarizes the current status of the principle of *caveat emptor*. The plaintiffs, husband and wife, had purchased a bathinette for use in bathing their baby. When fire broke out in the bathroom of their apartment, where the bathinette was kept, the thin magnesium tubing which formed the legs of the bathinette was ignited and burned fiercely, multiplying the danger to the plaintiffs and their three children. Both parents were injured in getting the children out of the burning apartment, and brought suit against the retailer, the manufacturer of the bathinette and the manufacturer of the magnesium parts. The evidence indicated that the magnesium parts did not ignite spontaneously, but began to burn only when they had been brought to a temperature of 1050° F. or more by heat from some source external to the bathinette itself. When the magnesium parts were ignited, however, they burned with an extremely intense blue flame which would only be aggravated by the superficial application of water. Jets of flame from the burning bathinette burned Mrs. Hentschel while she was in a bedroom separated from the bathroom by a hallway. The court of appeals, affirming judgment for the defendants, acknowledged that the manufacturer of an article is liable for negligence to third parties who are injured by the article if it is inherently dangerous in normal use and was in normal use at the time of the injury, but denied liability here because:

"There was no evidence to show that this bathinette had any hidden defect which would make it unsafe for use in bathing a baby in the usual way or that in ordinary use it would come in contact with heat of from 1050-1100° F., or more, to cause it to catch fire. There was nothing about it which would create a fire and unless subjected to such a high temperature the magnesium alloy would not burn at all." [27]

MacPherson v. Buick Motor Company [28] and other cases were distinguished as cases in which the goods were inherently dangerous in normal use. But:

"Here the bathinette was in no way dangerous in normal use. It was only in situations of abnormality that it became dangerous; that is where it was exposed to extreme heat, and it would not reasonably be expected that a bathinette constructed in part of wood and plastic would be used where it would come into contact with heat of some 1100° F.

[24] Walton H. Hamilton. "The Ancient Maxim of *Caveat Emptor*," 40 *Yale Law Journal* 1133, 1187 (1931).

[25] Cited at footnote 11.

[26] 3 Negligence Cases (2d) 1087, 215 F. (2d) 102 (CA-2, 1954).

[27] Case cited at footnote 26, at p. 104.

[28] Cited at footnote 5.

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Products liability and *caveat venditor* do not and should not connote automatic judgment for a plaintiff.

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"It is quite true that in abnormal situations, which would subject the alloy to heat in excess of its ignition point, the bathinette would become dangerous. But the danger would be a relative matter. The magnesium would be more dangerous in a fire than wood or some other substances used in making bathinettes because of its higher burning temperature. But where an article is not inherently dangerous in its normal or intended use neither its manufacturer nor vendor is liable for a result which is brought about by its subjection to unusual and extraordinary conditions." [29]

As for the claim against the retailer for breach of the implied warranty of fitness, the court said:

"The same conditions apply to the claim based on breach of warranty. There was, of course, an implied warranty that the bathinette was reasonably fit to be kept in a home for use in bathing a baby and was not a fire hazard in itself. But there was no warranty that it was non-combustible." [30]

Judge Frank, in a vigorous and scholarly dissent, takes the position that the jury should have been permitted to decide whether the defendants should reasonably have foreseen the danger of ignition of the magnesium parts in a household fire, with resulting injuries to consumers which would not have occurred in an ordinary household fire, absent the magnesium parts. He characterizes the majority opinion as holding that "the occurrence of a household fire is so 'abnormal' as not to be reasonably foreseeable by defendants," [31] and argues that in fact such fires are common and readily foreseeable, and that under these circumstances a jury may find that it is negligent to sell for domestic use, without warning, an article made of materials which, when the article is being put to its intended domestic use, "could easily transform an ordinary house or apartment into a fire-trap." [32]

Frank further argues that the language of "inherent danger" is meaningless and should be abandoned, and that the court's decision is contrary to sound social policy and is inconsistent with generally accepted standards of legal causation.

However persuasive one may consider the dissent, the fact is that the majority opinion in the *Hentschel* case dramatically illustrates the final limits which products-liability law now tends to approximate. The court's position is simply that (1) the bathinette was not "defective" and that (2) even if it was "defective," the defect was not the proximate cause of the plaintiff's injuries. Yet it is undeniable that the latent and unknown qualities of the bathinette contributed substantially to the plaintiffs' injuries, and that if they had not bought it, or if the manufacturer, anticipating the danger of domestic fire, had made it of less violently combustible materials, the plaintiffs would not have been injured.

Caveat emptor survives, then, primarily in the sense that the plaintiff bears the burden of proof on the issues of the existence of a "defect" in the technical sense and of the proximate causation of his injury by that defect. Judicial conceptions of sound social policy bulk large in the application of these standards, and, though one may upon occasion disagree with the results of these standards in particular cases, and may indeed predict their gradual liberalization in response to social pressures, there is no reason to challenge the standards themselves. Products liability and *caveat venditor* do not and should not connote automatic judgment for the plaintiff. In a libertarian society, there is a presumption of fault only where the evidence is so overwhelming as to make the inference inescapable, and this is true with respect to "defects" as well as with respect to negligence, whether or not the one is taken to imply the other. This means that we must accept the fact, however much we may abhor the principles of *Winterbottom v. Wright*,[33] that some innocent consumers are going to be injured by product defects and are going to be prevented by the applicable standards of proof from recovering damages to compensate them for their injuries, whether liability under these standards of proof is absolute or is cast in terms of fault. We may at least console ourselves with the knowledge that under modern conditions, when the sporting consumer throws his resources on the wheel of fortune, with a higher real income at stake, the odds are on his side. Nowhere, perhaps, are his chances better than in the automobile industry. **[The End]**

[29] Case cited at footnote 26, at p. 105.
[30] Case cited at footnote 26, at p. 105.
[31] Case cited at footnote 26, at p. 105.
[32] Case cited at footnote 26, at p. 111.
[33] Cited at footnote 11.

Recent Opinions of Attorneys General

FLORIDA—Where a motor vehicle is legally parked at the time of the accident, the operator does not have to comply with the provisions of the Financial Responsibility Law.—The Insurance Commissioner asked the Attorney General to define the term "legally parked" in connection with the Financial Responsibility Law. The Commissioner presented three possible situations in which the term "legally parked" might be applicable. The Attorney General considered these examples individually. In the first one the individual is legally parked (that is, within the confines of a place so designated for parking). However, he subsequently opens the door on the street side into a lane of moving traffic. It was the Attorney General's opinion that a motor vehicle is not "legally parked" within the meaning of the Financial Responsibility Law when a door or any other part of the vehicle extends into a lane of moving traffic.

He distinguished this situation from two others in which the driver is relieved of complying with the provisions of the Financial Responsibility Law.

In the second example the individual opens the door, alights from the vehicle and is standing on the pavement when a collision occurs.

In the third example, the individual is standing by his vehicle on the street side preparing to open the door when he is struck by an oncoming motorist.

In these two situations, the whole vehicle is within the parking space but at the time of the collision the operator either has not yet abandoned the vehicle or has returned to it with the intention of resuming operation of the vehicle. The Attorney General held that under these circumstances, the whole vehicle was within the space designated for parking and therefore "legally parked" within the meaning of Section 324.05(2), Florida Statutes.—*Opinion of the Florida Attorney General,* January 28, 1958.

ILLINOIS—A corporation which by contract agrees to replace a customer's broken or cracked plate glass window during a prescribed period of time is doing an insurance business.—The director of the Department of Insurance asked the Attorney General whether a corporation organized under the Illinois Business Corporation Act, and not under the Insurance Code, and engaged in the business of selling what is described by it as a "maintenance and service contract" in connection with plate glass windows is engaged in the business of insurance. The contract form used by the corporation provides for replacement of broken or cracked glass during a certain period of time "if contracted for." The Attorney General found that the words "if contracted for" are a condition precedent to the corporation's obligation to indemnify the obligee by replacing broken or cracked glass during the period involved. If specific provisions relating to this coverage are inserted in the contract, then it is a specific contractual provision to indemnify the owner in the event it is necessary to replace broken or cracked glass. In the Attorney General's opinion, this constitutes the doing of an insurance business.—*Opinion of the Illinois Attorney General,* April 17, 1958.

KANSAS—School districts may purchase nonassessable fire insurance policies from reciprocal insurance exchanges which are authorized to issue nonassessable policies.—The clerk of the Shawnee Mission Dis-

trict High School requested the opinion of the Attorney General as to whether school boards can purchase fire insurance from a nonassessable reciprocal insurance exchange.

The Attorney General stated that school funds can be expended by a district board only for the express purposes authorized by statute.

He noted that prior to 1955, reciprocal insurance exchanges were not authorized to issue nonassessable policies in Kansas because the purchase of such a contract by a school district would violate the provisions of the Cash Basis Law, the Budget Law and the Tax Limitation Law.

The Attorney General concluded by citing the following portion of General Statutes, 1955 Supplement, Section 40-1605, which now authorizes certain reciprocal exchanges to issue nonassessable policies: "Any reciprocal exchange having a surplus equal to the capital and surplus required of a domestic stock insurance company transacting the same kinds of insurance may provide for the issuance of a non-assessable policy."—*Opinion of the Kansas Attorney General,* December 6, 1957.

MONTANA—The county commissioners cannot expend public money to purchase insurance protecting the county treasurer as an individual from liability for the disappearance, destruction or theft of public monies, or for any other liability resulting from the default or neglect of the treasurer or his deputies.—The county attorney asked the Attorney General whether county funds could be expended to purchase insurance coverage for the county treasurer protecting him as an individual from liability for the disappearance, destruction, theft or wrongful abstraction of public money in his charge, or for any other liability resulting from the default or neglect of the treasurer or his deputies. The Attorney General was of the opinion that losses of the nature set out above would be covered, as far as the county was concerned, from the treasurer's official bond. The purpose of the proposed insurance coverage, then, would be to protect the treasurer as an individual in the event the bond surety looked to him for subrogation for losses incurred under his official bond.

The Attorney General stated that the county commissioners have no power other than that derived expressly or by necessary implication from the provisions of the statutes defining their powers. He found no statutory authority upon which the county commissioners could justify the expenditure of public funds for the purpose sought here.

In addition, the Attorney General noted that such an expenditure of public funds would be for a personal use and thus prohibited by the provisions of the Montana Constitution. He pointed out that the cases in which the state or county expends public funds for the premium payment upon an official bond should be distinguished from the present case. In the latter cases the expenditures are not made for the benefit of the officeholder as such, but for the protection of the entire citizenship.—*Opinion of the Montana Attorney General,* January 31, 1958.

TEXAS—Prior to the enactment of Article 1513a, Vernon's Civil Statutes, no foreign corporation could receive a permit to act as agent or attorney-in-fact for reciprocal or interinsurance exchanges.—The Commissioner of Insurance asked the Attorney General whether the Board of Insurance Commissioners was authorized by law to license a reciprocal or interinsurance exchange and its attorney-in-fact prior to the enactment of Article 1513a, Vernon's Civil Statutes, if the attorney-in-fact was a foreign corporation.

He replied that it was a well-settled rule of law that a foreign corporation is restricted to the purposes and powers which may be exercised lawfully by corporations chartered under the laws of Texas. The rule of comity would not permit a foreign corporation to obtain a permit to do business in Texas for a purpose not authorized under the laws of the state even though the purpose for which the corporation was formed and its powers were lawful in the state where the foreign corporation was chartered. (*Western Service Company v. Meharg, Secretary of State,* 116 Tex. 193.)

Since the Secretary of State was not authorized under the laws of Texas to issue a permit to a foreign corporation to act as agent or attorney-in-fact for a reciprocal or interinsurance exchange prior to the enactment of Article 1513a, Vernon's Civil Statutes, the Board of Insurance Commissioners was without authority to issue a license to the corporation to act in that capacity.—*Opinion of the Texas Attorney General,* March 26, 1958.

Books and Articles

Profit-Sharing Fact Book

The Investment and Administration of Profit Sharing Trust Funds. J. J. Jehring. Profit Sharing Research Foundation, 1718 Sherman Avenue, Evanston, Illinois. 1957. 152 pages. $3.50.

This author's last-chapter assertion would seem better placed at the front of his book: "No profit sharing plan will successfully fulfill its objectives if the employees for whom it is intended do not sufficiently understand or appreciate how it works and what it can mean to them." He also reminds that a "plan designed today may or may not meet tomorrow's needs."

Both of these warnings are connected with his discussion of professional consultants and their role in profit-sharing's operational considerations. But the statements seem generally important at this time, when profit-sharing trusts are becoming so numerous and are increasing so in size.

No matter what the pros and cons with regard to various aspects of this American industrial phenomenon, it seems to be with us to stay. Conceding this, it would appear that the work of organizations like the Profit Sharing Research Foundation will be a boon to administrators of existing trusts as well as to those faced with laying groundwork for such plans where none have previously existed. There can be no doubt about the tremendous job done by Mr. Jehring, director of the foundation, in compiling and summarizing material submitted by more than 200 contributors to this study.

The fact book offers an over-all picture replete with statistics. General divisions report separately on companies with 5,000 or more employees; from 1,500 to 5,000 employees; from 500 to 1,500 employees; from 100 to 500 employees; and 100 or fewer employees. Besides this "personalized service," the author also provides a division titled "Trust Funds in Companies of All Sizes with Limited Plans." In this group there are no plans with 100 or fewer employees reported on; otherwise, they are "scattered as to company size."

Also studied in view of the investment problem are investment counsel, insurance investments, mutual funds, pooled investment trust funds, banks and stockbrokers.

An appendix to the book contains two questionnaires. The first was sent to 714 companies, with 208 usable returns. The second went out to all who had returned the first questionnaire. The study closes with a bibliography of other research volumes containing information on investment of profit-sharing trust funds.

Life Insurance and Annuities

How Federal Taxes Affect Life Insurance and Annuities. Commerce Clearing House, Inc., 4025 West Peterson Avenue, Chicago 46, Illinois. 1958. 96 pages. $1.50.

To make the best possible use of life insurance and annuities, the effect of federal income, estate and gift taxes on the proceeds or premiums of life insurance and annuities should be considered. This book undertakes to explain and illustrate the provisions of the 1954 Internal Revenue Code, in which the taxation of life insurance and annuities underwent considerable change. The applicable sections of the Code are explained in a clear and easily understood style, and are illustrated by examples which clarify their meaning. Whenever feasible or necessary, the Commissioner's regulations are incorporated into the discussions. Twenty-

seven pages of actuarial tables which are used in computing annuities are reproduced.

The effect of income, estate and gift taxes on the different types of life insurance and annuities are considered and discussed comprehensively.

The discussion of life insurance falls into the categories of personal life insurance, employees' life insurance, business life insurance and the life insurance trust. Alimony insurance is treated briefly.

Attention is also given to the effect of taxes on accident and health insurance.

A special section is devoted to a discussion of the deferred compensation plan for executives.

Flexible Retirement

Criteria for Retirement. Edited by Geneva Mathiasen. G. P. Putnam's Sons, 210 Madison Avenue, New York 16, New York. 1953. 233 pages. $3.50.

Flexible Retirement. Edited by Geneva Mathiasen. G. P. Putnam's Sons, 210 Madison Avenue, New York 16, New York. 1957. 226 pages. $3.75.

Because the number of elderly persons in the United States is rapidly increasing, the problems connected with retirement and old age have come to the forefront of national concern.

The first National Conference on Retirement of Older Workers, held at Arden House on the Harriman, New York campus of Columbia University January 24-26, 1952, sponsored by the McGregor Fund and the National Committee on the Aging of the National Social Welfare Assembly, made it a project to study the problems of the aging and make recommendations not only for the welfare of our oldsters but also for the economic benefit of the United States.

The report of this conference was published in 1953 and followed up four years later by the book titled *Flexible Retirement,* which includes the programs and plans that grew out of the conclusions reached at the conference.

The dominant theme of the conference was that "chronological age has not proved acceptable as a sole basis for retirement policy." It was therefore the purpose of the conference to explore additional yardsticks for determining how long and under what conditions older workers should continue in employment or be retired.

The conference on the aging, by discovering the way an elderly person lives, what conditions make him fall into the category of aging, and his opinions on retirement, erased the stereotype of the 65-and-after person and substituted the individual as the prime element in the retirement situation.

Using the individual as their yardstick, the conference found it hard to determine a certain age called old age, since the aging process takes place at a different rate in every human being. Also, it was shown that the aged person has a more difficult time in the United States because of the youth-minded social structure in which we live. In our society no provision is made for the aged person to fit into the conjugal family living patterns.

The later supplemental book on flexible retirement delves into the possible plans for this type of retirement. It is shown that in retirement plans, businesses run the gamut from complete compulsory retirement with almost no exceptions, to no specific age requirement for retirement. Thus, between these two extremes some companies may have a fixed age for retirement but keep their over-age employees working if they are physically and mentally able to do so and if they desire to do so.

This book illustrates the many ways of setting up criteria for retirement other than the chronological age. For example, many companies work through their medical departments to determine whether or not a person should continue to work after a specific age, and then either keep him in the same job, switch him to a department where he can meet the requirements for work or advise him to retire. Also, on the positive side of retirement ideas are the guidance plans operated by some companies which begin to help the employee several years before retirement age. Such plans include regular medical checkups, personal counseling and informative lectures on life after retirement.

One important fact which was emphasized in the book on flexible retirement is that companies and industries vary in their business and labor setups just as much as individuals vary in their physical and mental capacity for work after retirement age. Thus, there cannot be one plan for all industry and business.

For the most part, both the original volume on retirement *(Criteria for Retirement)* and the supplemental later volume

(Flexible Retirement) present a thorough picture of the retirement situation and a good idea of what is being done to improve retirement plans.

Health Insurance in Retrospect

Voluntary Health Insurance and Medical Care. J. F. Follmann, Jr. Health Insurance Association of America, 60 John Street, New York 38, New York. 1958. 78 pages.

Voluntary health insurance has taken great strides in recent years because, as Mr. Follmann amply illustrates, it has served the public need. The author's principal concern in writing this monograph lies in detailing the work of the insurance business in the field of accident and health insurance during the years 1952-1957. In this respect his subject matter is exhaustively treated. The facts are buttressed by copious statistics, graphically illustrated.

In support of his major premise, Mr. Follmann cites many indications of the increasing effectiveness of the private health insurance mechanism.

He points out that the dollar amount of insurance benefits paid to the American people yearly is increasing. In 1952, the amount paid by all types of health insurers was $2,083,000,000. In 1956 this amount was $3,640,000,000, an increase of 74.7 per cent.

Another indication is found in the growth of the number of insurance companies offering protection to the public. On January 1, 1953, there were 514 insurance companies of record actively writing accident and health insurance in the United States; by January 1, 1957, this number had grown to 671, a growth of 30.5 per cent. During this period many companies which formerly limited their activities to individual risks entered the group writing field.

Broadened underwriting concepts made available to older and retired persons the benefits of insurance protection. Progress in the insurance field is continuing to be made by the following methods: The continuation of group insurance on older workers; the continuation of group insurance on retired workers and their dependents; the continuation on an individual policy basis of coverage originally provided by group insurance; the new issuance of group insurance at advanced ages; the continuation of individual insurance previously purchased; the new issuance of individual insurance at advanced ages; and the issuance of individual insurance which becomes paid up at age 65.

Another development Mr. Follmann cites is the extension of group insurance to persons employed in small groups. Small employers who individually have insufficient numbers of employees to qualify under traditional group insurance requirements can, by aggregating their employees through associations to which the employers belong, qualify for the traditional forms of group insurance.

A further broadening of underwriting concepts is that of making insurance protection available to substandard risks, that is, persons presently having an illness or physical impairment as to have formerly denied them the benefits of insurance. Furthermore, the dependents of insured policyholders have been insured. Cancellable policies offer sound protection at the lowest possible cost. Noncancellable and guaranteed renewable policies provide similar protection at somewhat higher cost.

Major medical expense insurance was developed and extended so that greater protection was afforded the public against the more serious or catastrophic medical costs which often cannot be budgeted against by the average person and which can seriously impair or wipe out individual resources. In the years 1952-1957 underwriting principles have been revised and liberalized; costs of administration have been scrutinized and reduced wherever possible, to the end that more of the insurance dollar might be available to the policyholders; and coverage exclusions and limitations have been reduced.

In summarizing, Mr. Follmann points out that voluntary health insurance and medical care play a significant and vital role today in that it serves as a means of relieving the government of the responsibility for using public funds derived from taxation in order to assure adequate medical care for a large proportion of the citizenry.

Effective Communication

Oral Communication of Technical Information. Robert S. Casey. Reinhold Publishing Corporation, 430 Park Avenue, New York 22, New York. 1958. 199 pages. $4.50.

One of the pieces which made Robert Benchley famous as a humorist was that which dealt with the presentation of a financial report. While Benchley's presentation of the financial report was intended to be humorous, the presentation of technical papers and technical reports is usually a very serious matter. This presentation is

designed to add to the listener's fund of knowledge—and too often it fails its purpose. The speaker may understand his subject thoroughly; the listener may want to understand it as thoroughly; but, because of failure to "communicate," understanding between the two parties is not accomplished. The ordinary book on how to make a speech will not do when technical information is to be conveyed from a speaker's mind to the minds of his audience, because it isn't a question of making them laugh or seeing their viewpoint. Imparting understanding is a technique all its own.

Mr. Casey writes out of experience, as he is the chief chemist for the W. A. Sheaffer Pen Company, Fort Madison, Iowa, and has written a number of articles on chemistry. His little book—which, incidentally, is printed in blue ink on white paper—assembles and organizes information that will help technical people get across their ideas. He has helpful hints on the presentation of audio and visual aid and the preparation of formally prepared talks.

Business Interruption Insurance

Business Interruption Primer. John D. Phelan. The Rough Notes Company, Inc., 1142 North Meridian Street, Indianapolis 6, Indiana. Fourth edition, 1957. 87 pages. $1.50.

This new edition of the *Business Interruption Primer* covers the important developments in the business interruption insurance field that have occurred during the last three years. The author explains why a firm needs business interruption coverage and how much it should have. How to write the insurance, as well as how to sell it, is also included.

The book is written especially for the local agent and broker who would like to expand his writings by selling this underdeveloped coverage. According to Mr. Phelan, only about 10 per cent of the retailers carry business interruption coverage, and two thirds of those that do not carry it have never been solicited by an agent.

Essentials of the Constitution

The Bill of Rights and What It Means Today. Edward Dumbauld. University of Oklahoma Press, Norman, Oklahoma. 1957. 242 pages. $3.75.

Thomas Jefferson: The Apostle of Americanism. Gilbert Chinard. Ann Arbor Paperbacks, The University of Michigan Press, Ann Arbor, Michigan. 1957. 548 pages. $1.95.

Not so long ago, the Fund for the Republic, Inc., was called upon to defend some of its grants. In its defense it pointed out that the fund was not set up to fight Communism but to defend and advance the principles of the Declaration of Independence, the Constitution and the Bill of Rights. One of the first reports furnished to the fund disclosed added reason for the grants: Professor Stouffer of Harvard reported an alarming degree of general ignorance of and indifference to the Bill of Rights. This, and much of what is happening today, makes the reading of this book particularly rewarding.

The present Constitution would never have been accepted by the people had it not been for the promise of the addition of the amendments called the Bill of Rights. They are the essential portions of the Constitution. They guarantee freedom to a liberty-loving people. They express the very essence of the American form of government. The people who left the shores of an old world to establish a civil society in a new world brought with them only such laws as they were able to adapt to their new society, and they brought with them certain natural, inalienable rights. The government they established by their consent was ordained to protect and secure these pre-existing rights, and there remained in the people, after a new government was formed, an area of unsurrendered rights. The ten amendments to the Constitution specify this area of rights into which the government shall never intrude itself.

Freedom of religion, freedom of the press, trial by jury and habeas corpus are accouterments of a free people and a free society. They are the arms of truth first dismembered in a controlled society. The Bill of Rights and what it means to you is extremely important in an atomic-age society. The readers of this magazine serve as spheres of influence and, to be sure, each now has some knowledge (some to a greater, some to a lesser, degree) of the Bill of Rights. But this book will serve to fix these amendments into their philosophical background and present-day potency.

Mr. Dumbauld is also the author of a companion book *The Declaration of Independence and What It Means Today.* He is a practicing attorney in Pennsylvania.

We grouped the second book, *Thomas Jefferson: The Apostle of Americanism,* with Mr. Dumbauld's because the Bill of Rights is largely a reflection of Jefferson's political

philosophy and, therefore, a history of this mental giant is appropriately read with the Bill of Rights being played softly in the background. This biography—a penetrating study of his political, social and religious ideas—is not a new book; but it was recently issued as a paperback by the University of Michigan Press.

Study in Personnel Administration

Personnel Administration—A Point of View and a Method. Paul Pigors and Charles A. Myers. McGraw-Hill Book Company, Inc., 330 West 42nd Street, New York, New York. Third edition, 1956. 711 pages. $6.

The first edition of this book was published in 1947 and the second in 1951, each meeting with great success. It is truly a superior work in the field of personnel administration, and its authors, both of whom are professors of industrial relations at Massachusetts Institute of Technology, have added a good deal of follow-up material to complement their earlier efforts.

One of the book's most outstanding features is its detailed case histories. Offered as completely as possible, with little left out or "edited," they provide the student with realistic thought-provoking material. Since a truly lifelike situation can be bewildering to an inexperienced student, however, long cases are divided into sections, with helpful questions inserted to gauge the reader's perception into personnel problems.

The authors hasten to explain that the purpose of these questions is not to supply right and wrong "prepared problem" situations:

"Case study can be taught academically, with 'prepared problem cases', as though there were nothing more to it than finding solutions to neatly formulated problems. But of course what comes first is learning how to ask realistic questions. One student who had graduated with honors, but failed on his first job, made a classic statement of his difficulty: 'If only someone would give me a *problem*, I know I could solve it. But all I can see here is a *mess*.'"

The worth of the volume can be indicated, too, by the position that its authors take on the subject of their question choices. They do not maintain that the questions they have offered are the best possible ones; rather, they offer them only as samples and encourage the teacher and student to re-examine, re-evaluate and restudy the cases themselves. "The aim that we all have in common," they state, "is to stimulate the questioning approach."

Personnel Administration is still addressed primarily to personnel administrators, both those in the field now and those planning to go into it. The objectives, approaches and methods of personnel administration, however, are of as much concern to others in management as they are to personnel people; the book points up, in a significant manner, this relationship throughout.

ARTICLES

Articles of interest in other legal publications

The Insurer and the Tidelands Area . . . A warning note to insurers of employers in the tidelands area is contained in a recent article by a New Orleans attorney. In his article, the author discusses the liability of the insurer in a tidelands personal injury action. The warning concerns the writing of a multiple coverage policy which excludes coverage for maintenance and cure of maritime employees.

Maintenance and cure is the obligation of a shipowner and operator to pay to the employee of a crew wages to the end of the voyage. The duty of maintenance and cure is imposed by law as an incident to the relationship of shipowner and crew employee, regardless of the terms to which the parties contracted.

"Maintenance and cure are paid at the prevailing rate until the claimant has been discharged to return to work or until he has attained his maximum recovery. Not many cases have arisen in this field as a result of tidelands operations, but it should be noted that many contracts of insurance contain an endorsement excluding coverage of liability for maintenance and cure. If the employer fails to pay maintenance and cure, and is faced with a suit under the Jones Act on the basis that his failure to pay maintenance and cure caused plaintiff to become incapacitated to a greater degree than he would have been had it been paid promptly, the insurer who did not contract to pay maintenance and cure will find itself defending a suit and be faced with the possible payment of a liability judgment which it perhaps did not intend to cover. Underwriters should carefully consider this problem."—Carrers, "Recent Developments in Personal Injury Law in the Tidelands," *Tulane Law Review*, February, 1958.

The Coverage
News and Opinions

Salesman Misrepresents Details of Bank-Financed Insurance Plan

An insurance salesman had the duty of giving his client complete and unbiased information about an insurance plan so that the client understood it sufficiently to make an independent decision whether or not to purchase (*Knox v. Anderson*, District Court of Hawaii, February 17, 1958).

The plaintiff, an insured, sued an insurance salesman (the defendant) for fraudulently misrepresenting the details of his bank-financed insurance plan. Bank-financed insurance is not a revolutionary concept. The method prescribes a bank loan. Instead of the loan being paid to the borrower, it is utilized by the bank to pay his insurance premiums as they become due. Under the present tax law, the interest paid to the bank on the loan is deductible for income tax purposes, and the saving thus incurred can be used to purchase additional insurance coverage if desired. The amount of this saving depends on the insured's tax bracket.

The facts of the case were as follows: The defendant established an office in Honolulu to sell bank-financed insurance. One of the prerequisites he demanded of clients was that the schedule which he drew up explaining the operation of the insurance plan was not to be shown to any other insurance agent. The defendant visited the plaintiff to present the program and show him exactly how it would work in his case. The program was presented in schedule form. The plaintiff was informed that the program, which was based on a 40 per cent tax bracket, would work just as well in the 30 per cent bracket. He was assured that a $100,000 policy, which he first took out on his own life, and a $50,000 policy, which he later took on his wife's life, would "fit into his program." He was assured that he could always reduce the amount if, for unforeseen reasons, the insurance proved too great a burden. The plaintiff was left with the belief that there would be no loss involved if such a reduction became necessary. The final schedule was also based on the 40 per cent tax bracket. After several weeks the plaintiff took his final schedule to an investment broker for budget advice. He was told that he had bought more insurance than he could carry. The plaintiff then wrote to the insurance company, explaining his discovered inability to afford the $150,000 program, and asked for favorable terms upon which to liquidate. This was possible if the selling agent agreed. However, the defendant refused to cooperate because he contended that, by showing the schedule to another agent, the plaintiff had violated their agreement. The plaintiff finally had to cancel the policies with the insurance company. The defendant claimed that he did feel obliged to point out the pitfalls of the intricate program, but that he understood the obligation to be only moral.

The court held for the plaintiff. He was awarded his actual damages of $13,309.98, and given further awards of $2,500 for mental suffering and $10,000 as punitive damages.

The court said that the defendant was nothing more than a salesman. Yet in the past he had stated that it had taken him years to work out the details of his bank-financed insurance plan based on schedules which he boasted no one could understand. The court noted that when defendant exacted an agreement that the schedules would not be shown to any other insurance agent, he effectively blocked all avenues of infor-

PERSONS AND EVENTS

The Illinois Insurance Department will hold a meeting at 7:30 p. m. Tuesday, May 20, in the Centennial Building in Springfield, Illinois. Anyone in the insurance business is welcome to attend, and **Robert E. Dineen,** vice president of Northwestern Mutual Life Insurance Company of Milwaukee, will speak on "Do You Know the Importance of Your Work?"

The eighty-ninth annual meeting of the National Association of Insurance Commissioners will be held June 9-13 at the Conrad Hilton Hotel in Chicago. Other scheduled meetings of the NAIC include a special executive committee meeting June 5-6 and a meeting of the Commercial Pension Funds and Trusteed Welfare Funds Subcommittee on June 7. These meetings will also be held at the Conrad Hilton, Chicago.

At a meeting of the board of directors of the New Amsterdam Casualty Company, several appointments were approved, including that of **Leon Kirschenbaum** to the position of resident vice president and assistant general counsel.

Joe B. Hunt, Insurance Commissioner of Oklahoma, has announced the appointment of **Robert D. Allen** as first Assistant Insurance Commissioner. Mr. Allen succeeds **Jack W. Lawter,** who resigned to become president of the Commonwealth Life Insurance Company of Tulsa.

The Wisconsin Association of Mutual Insurance Agents will hold its annual convention June 11 and 12 at the Schwartz Hotel, Elkhart Lake, Wisconsin.

Webster Atwell, general counsel, Great National Life Insurance Company, was elected president of The Association of Life Insurance Counsel at the association's spring meeting. **Buist M. Anderson,** vice president and counsel, Connecticut General Life Insurance Company, was elected vice president; and **Chester L. Fisher, Jr.,** assistant vice president and assistant to the president, Metropolitan Life Insurance Company, was re-elected secretary-treasurer. The executive committee for the coming year will include **Abram T. Collier,** vice president and general counsel, John Hancock Mutual Life Insurance Company; **George L. Gordon,** general counsel, Business Men's Assurance Company of America; **John W. Graham, Q. C.,** general counsel, The Imperial Life Assurance Company of Canada; **Harry S. Redeker,** general counsel, The Fidelity Mutual Life Insurance Company; and **Daniel J. Reidy,** vice president and general counsel, The Guardian Life Insurance Company of America.

mation because the best source of information was someone with an insurance background. The court held that the defendant, after gaining the plaintiff's confidence, did not explain the insurance plan so that plaintiff understood it sufficiently to make an independent decision. In effect, it was the defendant who made the decisions and who thereby took upon himself the task of rendering intelligent insurance service based on the requirements and capacity of the plaintiff to pay. The defendant failed in his responsibilities, because after devising a complicated insurance plan tailored for a man in the 40 per cent tax bracket, he sold the plan to the plaintiff, who was in the 26 per cent tax bracket. As a result the plaintiff suffered a loss. The court concluded by saying that whether the defendant knew the plaintiff's tax bracket or not was immaterial. He should have known. It was a pivotal consideration upon which the successful operation of the plan over the years depended.

The bank-financed insurance plan was discussed in the October, 1957 issue of THE INSURANCE LAW JOURNAL by Benjamin M. Becker and David M. Sloan.

Taxability of Commissions Paid to Life Agent

An insurance agent's commissions on policies that he bought on the lives of his former partner, three employees and his children are income to him, held the United States District Court for the Eastern District of Pennsylvania.

The plaintiff, an insurance agent, brought suit against the United States Government to recover the additional tax he paid because the revenue officials included in his income the commissions he received from the insurance companies. He contended that these commissions were not income to him but were instead a reduction of the price of the policies.

The United States District Court held for the defendant. It cited an Internal Revenue Service ruling as precedent. The ruling read: "A commission retained by a life insurance agent on his own life insurance policy is held to be income accruing to the agent, and should be included in his return of income for the assessment of the income tax." The court noted that this ruling was reaffirmed in 1932 and again in 1955. It reasoned that the ruling would have the same application to the commissions which the agent received when he bought policies on his children's, employees' and his former business partner's lives. Since the administrative interpretation was followed over a long period of time, the court gave it great weight and stated that the plaintiff had the burden of proof to show that it was erroneous.

The district court concluded that it would be a violation of the law for an insurance company to have sold insurance to the agent at a lower rate than that charged other policyholders.—*Optheimer v. U. S.*, 58-1 USTC ¶ 9359.

Four Conditions Responsible for Rising Rate Trends

Rates for automobile liability insurance will continue to rise as long as traffic accidents, general economic inflation, jury verdicts and taxes continue to soar upward, stated J. Dewey Dorsett, general manager of the Association of Casualty and Surety Companies at the Seventh Annual Insurance Day Luncheon in San Francisco in April.

Throughout the nation, there is a mounting swell of public resistance to rising prices for most of life's necessities and some of its luxuries, he said. It is therefore understandable that the people want to know why prices continue to rise in the midst of an economic recession that is pulling employment and values down.

Mr. Dorsett maintained that rates justifiably continue to soar in the insurance field; the average country-wide increase in automobile liability insurance rates has lagged far behind the same rise in costs for everything that affects insurance rates, he declared. Mr. Dorsett showed that from 1953 to 1957, automobile repair costs rose 19 per cent; medical care, 17 per cent; physicians' fees, 16 per cent; and hospital rates, 33 per cent. Against these costs he compared the average country-wide rise of only 9.3 per cent for automobile liability insurance.

Mr. Dorsett stated that although several states have filed for higher rates, the rate increases were denied.

In New England, for example, a state Insurance Commissioner turned down a filing for increased automobile bodily injury rates (compulsory insurance) because he didn't think it was needed. On appeal to the supreme court, the evidence was reexamined and the court ordered the Commissioner to approve the filing with only a minor change.

In a Middle Atlantic state, the Superintendent of Insurance vetoed a filing for increased automobile liability rates because his state was inexperienced with its brand-new compulsory automobile insurance law. Some of the most influential newspapers in that state soundly criticized the Superintendent's explanation and called attention to the fact that an important election was due in the autumn. That case, too, is now in the course of expensive litigation.

In two other states—one in the East and the other in the West—the Insurance Commissioners approved rate filings and then reversed themselves at their governors' request. One of those filings has since been reapproved.

In a southern state a rate increase was denied by the Insurance Commissioner because the farmers had suffered crop losses. In another southern state the Commissioner approved an increase and then rescinded it because several influential newspapers complained that there had been no public hearing. When a public hearing was called, only two citizens put in an appearance.

Mr. Dorsett pointed out that these conditions do not exist in all of the states. In most of them, the Insurance Commissioners remembered that it was quite as important to the public interest that the insurance companies are kept solvent, so that they are able to pay their claims, as it is to prevent execssive rates. They approved increases upon an adequate showing that they were necessary and just.

Mr. Dorsett criticized the inadequate information which the public is receiving about the yearly mounting traffic accident rate. Although deaths, of which there were 40,000 in 1956, were highly publicized, in the same year, 1,400,000 persons were injured and property damage accidents rose to 11 million. Economic losses exceeded $7 billion. The insurers, he pointed out, paid not only the death claims but the claims on injuries and property damage as well.

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In defense of the charge that automobile liability rates are "too high," Mr. Dorsett cited figures for the ten-year period of 1947-1956. In six of those years the insurance companies suffered heavy underwriting losses and their over-all loss for this period was $230,967,000.

Dividing the 1956 automobile liability premium dollar into its component parts, he found that 72.7 per cent was paid out for losses and loss adjustment; 26.7 per cent for production expenses; 5.9 per cent for general expenses; and 3.1 per cent for taxes, licenses and fees—leaving a net loss before federal taxes of 8.4 per cent.

Although there has been talk that the capital stock companies should be more selective in choosing the risks they insure, he said that this would call for a considerable amount of governmental cooperation, which is not being given. He believes that if the state governments would put accident repeaters and chronic law violators off the road, there would be no need for the insurance companies to be burdened with a police responsibility that belongs solely to the government. Within less than a year the accident rate would drop, he said, and the present "too high" rates would tumble with them.

Declaring that 99 per cent of the cure for high insurance rates rests in the hands of the people and "their public officials," Mr. Dorsett asserted that the place to begin bringing about lower rates was in the traffic accidents. Until there is an accident, there is no claim, no expensive and frequently dishonest repair costs, no skyrocketing medical and hospital bills, no effects of general economic inflation, no high jury verdicts, and none of the other ingredients that keep the rate pot boiling. The base of the automobile insurance rate problem, he declared, is the shocking and unnecessary traffic accident record.

Mr. Dorsett does not suggest that we shall ever be free of motor vehicle accidents, but says that if the state authorities would modernize and impartially enforce sound traffic laws, if the legislatures would pass adequate driver licensing laws, which would at least keep feeble-minded people from behind the wheel, and if the courts would fit the punishment properly to the crime that has been committed, traffic accidents would be cut in half within a year. He contends that making and enforcing laws is the job of the government, not of the insurance companies.

High jury verdicts, Mr. Dorsett claimed, are another element in the soaring rate increases. He claimed that the public, which has to foot the bills in the end, should be informed that rising jury verdicts are pushing up their insurance premiums both directly and indirectly.

Awards should be made on the basis of justice rather than sympathy. We should remember that it is the public's money that is being given away. Mr. Dorsett found that in New York State the average jury award was $3,500 in 1941 and $11,200 in 1957—a rise of 221 per cent. Jury awards have skyrocketed nearly 600 per cent in another area of that state. Although the courts should take into consideration the present inflated cost of living in awarding damages, he contended that these awards should be in keeping with the Consumers Price Index, which rose only 94 per cent during the same period.

The direct impact of high jury verdicts on insurance premiums is substantial. The indirect impact is greater yet, because rising court verdicts force the companies to make higher and higher out-of-court settlements. Since court proceedings are bothersome and expensive, the companies are obliged to settle a great many of their cases out of court at high figures, rather than bear the expense of litigation and risk the probability of being hit by an even higher jury verdict.

He listed 24 different taxes, fees and contributions to various state funds that the insurance companies are required to pay.

Mr. Dorsett said that the statement that licenses and fees represent 3.1 per cent of

the insurance dollar was somewhat of an understatement. Actually there is no way of telling exactly how much of the insurance dollar goes to the government in the form of straight taxes, fees, licenses and funds. The 3.1 per cent figure is the minimum. He indicated that these taxes are unequal among the states, with the higher taxes being assessed most often in those states that have the highest insurance rates.

In a number of states the administration of such laws as compulsory automobile liability insurance, motor vehicle safety (financial) responsibility, and unsatisfied claim and judgment funds were paid by the insurance companies.

In New York, for instance, the insurance companies were obliged to pay for the administration of the motor vehicle safety responsibility law, which in 1956 exceeded $2 million. Now the companies pay for the administration of New York's new compulsory automobile liability insurance law.

In concluding, Mr. Dorsett stated that all of these taxes, fees, payments and contributions find their way into the rate structure, taking dollars and cents out of the public's pocket. "So it seems to me, if those few public officials who have been so severely critical of the insurance companies are sincere in their proclaimed zeal to protect the public against rising insurance rates, there is no better way for them to start reducing costs than by reducing taxes and practicing economics in the administration of insurance-financed laws."

Dental Insurance Programs and the Public Need

The future of insurance or prepaid plans that help cover the cost of dental care rests squarely on public demand, Joseph F. Follmann, Jr., director of information and research of the Health Insurance Association of America, told the annual meeting of the American Association of Industrial Dentists in Atlantic City, New Jersey, on April 22.

Although insurance companies do write policies covering dental costs and have recently experimented with more complete protection, Mr. Follmann explained that two factors have hampered the development of dental insurance programs: absence of sufficient public demand and lack of usable statistics with which to calculate accurate costs.

Several questions still remain unanswered, he pointed out. Does the public really desire dental insurance? Can dental insurance meet the tests of sound insurance mechanisms? In the long run, which will provide the greatest value to the American people—dental insurance or dental care paid for by the individual through regular budgeting from earnings?

"The answers to these questions, if known," Mr. Follmann stated, "would appreciably aid in any needed development of insurance mechanisms for dental care."

While the average dental cost to the American family in one recent year was $33, he noted, the actual cost varies with different families. In that year, 44 per cent of American families had no dental costs at all; 35 per cent had costs ranging from $1 to $45; 10 per cent had dental bills between $45 and $95; 6 per cent had bills between $95 to $195; and 4 per cent of the nation's families had dental costs exceeding $195. Although 10 per cent had costs of $95 or more, Mr. Follmann observed that there was no indication that such costs were a yearly occurrence or of the proportion spent for luxury or cosmetic care.

Most dental insurance programs were developed after 1954. Among the sponsors have been labor union welfare fund plans, cooperative plans, employee association plans, a prepaid group practice plan, two nonprofit service-type plans, expansion of prepayment plans to include dental costs, and various insurance company approaches. Some of these programs are apparently successful, although all are in a more or less experimental stage. Some have clearly failed.

The Health Insurance Association of America, representing 267 insurance companies which write health cost policies, has been cooperating with the American Dental Association over the past year in preparing a statistical base for dental health care plans.

"Should it become possible to develop such statistics," Mr. Follmann remarked, "progress toward more insurance company coverage for dental care would be appreciably aided."

Appellate Court Reverses *Sanders v. Fox*

Life insurance premiums paid by a corporation are not constructive dividends to the insureds. The decision of the United States Court of Appeals for the Tenth Circuit in *Sanders v. Fox*, 58-1 USTC ¶ 9415, by reversing the Utah District Court, com-

pletely ruled out any danger that premiums which are paid by a corporation on life insurance which it owns on its stockholders will be taxed to the insured stockholders as constructive dividends. The *Sanders* case, which involved the funding of an insured stock-retirement agreement, is now in keeping with *Prunier v. Commissioner*, 57-2 USTC ¶ 10,015. These cases were discussed in the December, 1957 and the March, 1958 issues of THE INSURANCE LAW JOURNAL.

Although the four stockholders in the *Sanders* case had the right to designate the beneficiaries, the corporation remained the owner of the cash surrender values and of all other rights under the policies. The purpose for taking out the insurance was to fund an agreement to retire the stock of each stockholder, at a guaranteed minimum price, at the time of his death. The court held that the stockholders were not in receipt of constructive dividends, because the immediate present benefits to the stockholders arising from the execution of the agreement—such as the assurance of a market and a guaranteed minimum return on their stock, the appreciation of the value of their stock and the retention of corporate officers acceptable to their limited group—were not taxable incidents. The court noted that whatever taxable benefits they may receive from this agreement and these policies are contingent upon future happenings and incapable of present determination. The immediate benefits of the investment redound to the corporation. The court held that under such circumstances, it is not proper to impress premiums presently being paid with the label of constructive dividends.

Nuclear Reactor Licensees—Financial Responsibility Requirement

The Atomic Energy Commission has by the issuance of regulations implemented the indemnity provisions of the atomic energy law. These regulations will be effective until definitive regulations are issued. Each licensee authorized to operate a nuclear reactor is required to maintain financial protection in the amount of $150,000 per 1,000 kilowatts of thermal capacity authorized by his license; however, in no event shall the amount be less than $250,000 for each nuclear reactor. This formula is deemed appropriate for power reactors and the larger research and test reactors. It does not, however, concern those operating at very low power.—CCH GOVERNMENT CONTRACTS REPORTS, ¶ 68,160-68,171.

Insurance Practices Investigated

Investigations of insurance practices by the Antitrust Division of the Justice Department have resulted in increased competition within the insurance industry, according to Victor R. Hansen, Antitrust Division head. He recently addressed executives attending the American Management Association's spring insurance conference in New York.

Mr. Hansen noted that the purpose of the McCarran Act, passed in 1945, was to preserve and protect healthy competition in the industry. It paved the way for a coordinated system of state and federal control. The act provided for a moratorium period of three years in which the states could enact regulatory measures for the insurance business. At the end of this period the Sherman and other antitrust acts became applicable to the business of insurance "to the extent that such business is not regulated by state law," he said.

Most of the state laws enacted in the moratorium period, he pointed out, permit cooperative rate making through licensed rating bureaus, but incorporate provisions designed to preserve competition and to correct abuses within the industry. Where the state law does not cover an abuse or the state is not enforcing one of its laws, the Department of Justice may step in. Some 30 preliminary investigations have been conducted by the Antitrust Division, he reported, and nearly half of these have resulted in full investigations conducted by the FBI or by federal grand juries. The scope of these investigations has included almost every phase of the insurance field.

Mr. Hansen cited the case of the government v. Investors Diversified Services, which was terminated by a consent judgment in 1954. The complaint charged that IDS had entered into agreements with its residential mortgage loan borrowers which illegally required the borrower to agree that all hazard insurance maintained on the property secured by the mortgage would be written, placed and sold by the mortgagee.

Such tie-in agreements, Mr. Hansen pointed out, are inherently anticompetitive and, in the view of the Department of Justice, are illegal unless they can be shown to be reasonable under the peculiar and particular facts in each individual case.

"Intelligent businessmen do not wish to invite litigation upon themselves and consequently they cease practices that have been held to be illegal by the courts or . . . voluntarily relinquished in consent decrees."

What the Courts Are Doing

Selected Decisions from All Jurisdictions

NEGLIGENCE

Summaries of Selected Decisions Recently Reported by CCH NEGLIGENCE REPORTS

Charitable Immunity

The doctrine of charitable immunity was upheld where a paying patient sought to recover damages against a charitable hospital for injuries which were attributable to the negligence of the hospital's employees. Pennsylvania.

The plaintiffs, husband and wife, sued the defendant hospital in damages for injuries allegedly suffered by the wife when she fell and fractured an ankle while a patient in the hospital. The wife was a paying patient. She was injured when hospital employees, who prescribed certain weakening drugs, directed her to walk. Upon obeying their instructions, she fainted, fell and fractured an ankle. The hospital raised as a defense its immunity, as an eleemosynary institution, from tort liability. The trial court entered a nonsuit and the plaintiffs appealed from the judgment. The plaintiffs' sole argument was that (1) the rule of immunity of charitable institutions from tort liability should be repudiated and (2) the case should be remanded for a trial on the merits as to the defendant's negligence and the plaintiff's damages.

On appeal the supreme court affirmed the trial court's judgment. The court stated that the immunity of an eleemosynary institution from tort liability has long been the established rule in Pennsylvania. The rationale for the rule lies in the theory that a charity is a trustee of its funds and is bound to apply them in furtherance of charitable purposes only. The court indicated that if the doctrine of charitable immunity was to be changed, the legislature and not the courts should effect the change. The court was of the opinion that if the rule were to be abandoned by court decision, it would lay open to liability all charities for their past torts which were not barred by the statute of limitations at the time of the rescinding decision. However, the court held that if the rule were abrogated prospectively, by the legislature, all the charities which were made subject to tort liability in the future could protect themselves by purchasing insurance. Furthermore, the court stated that the legislature was better equipped to deal with a question of public policy, which the rule of charitable immunity posed.

The dissent argued that there was an inconsistency in the law because a charitable institution could be sued for maintaining a nuisance and could be required to pay the resulting damages. If it could be held liable for damaging the property of others, why should it not be amenable to liability for injuring the physical bodies of others? The dissent noted that a lawsuit against a charitable hospital would not endanger its financial standing because insurance was now available to guard against the danger of dissipation. While insurance should not be made a criterion of responsi-

bility, the prevalence and low cost of insurance should be important considerations in evaluating the fears of dissipation. The dissent held that since the doctrine of charitable immunity was not initiated by the legislature but by the court, the court should repudiate it. The dissent held that it was unfair to deny to those who are entitled to redress an opportunity to seek that redress by invoking the doctrine of charitable immunity.—*Knecht et al. v. Saint Mary's Hospital.* Pennsylvania Supreme Court. March 24, 1958. 7 NEGLIGENCE CASES (2d) 1372.

Optometrist's and Optician's Duty to Their Patient

An optometrist and an optician were under a duty to disclose to a patient a pathological eye condition which could not be helped by the prescription of glasses. District of Columbia.

The plaintiff, a patient, brought a suit against the defendants, an optician and an optometrist, charging them with negligence in their treatment of an eye condition—that is, that they failed to discover and/or timely advise him of the presence of a tumor. He also charged them with knowingly falsely representing that he needed eyeglasses. He visited the defendant optician to have his eyes examined. The optician's optometrist was on vacation, so the optician made arrangements for the plaintiff to have his eyes examined by a competing optometrist. The optometrist examined the plaintiff's eyes and telephoned the results of the examination to the optician. The optometrist told the optician that the plaintiff was probably suffering from a pathological condition and should see an ophthalmologist. Neither the optician nor the optometrist informed the plaintiff of these findings. The optician then proceeded to grind a pair of glasses for the plaintiff, who subsequently lost the use of his right eye due to the pathological condition. The trial court granted both defendants' motions for summary judgment.

On appeal, the judgment of the trial court was reversed. The question was whether the defendants, in the execution of their duty, were required to impart to the plaintiff the fact that he should consult a doctor who might make a correct diagnosis. The optometrist defended on the ground that he was merely helping the optician in his examination and that the patient was not his directly. The optician's defense was that since he was unlicensed, he was justified in withholding the information from the plaintiff.

The court noted that the optometrist joined the optician to accomplish a business result common to both, for which a charge was to be made which both would share. The consulting optician had undertaken an affirmative line of conduct and throughout he was under an affirmative duty to take whatever precautions were reasonably required to protect the plaintiff from negligence stemming from that conduct. The court said that it would not be concerned with the fine distinctions between "misfeasance" and "nonfeasance." Even though unlicensed, the consulting optician was under a duty to the plaintiff to speak and did not do so. The court disposed of the optometrist's defense by stating that even though the plaintiff was not his patient directly, he also owed him a duty to speak after he identified the plaintiff as a pathological case. The optometrist was not absolved from liability by merely phoning the information to the optician.

The court held that whether or not the plaintiff was actually induced by the fraudulent misrepresentations to purchase the glasses was a matter of proof. The court was therefore unable to consider whether or not the defendants' conduct constituted the legal cause of the plaintiff's ultimate loss of vision in his eye. The court concluded that the evidence as to all the issues must be developed in a trial in which the plaintiff may prove that he is entitled to a jury trial.—*Evers v. Buxbaum et al.* United States Court of Appeals for the District of Columbia. March 6, 1958. 7 NEGLIGENCE CASES (2d) 1369.

Short Shorts from the Courts

Maryland . . . The owner of a riding academy was liable to a horseman who was thrown from a horse because of the known propensity of the animal to bolt when a particular dog kept about the stable came near.—*Herbert v. Zeigler.* Maryland Court of Appeals. March 27, 1958. 7 NEGLIGENCE CASES (2d) 1449.

New York . . . The state could not be held liable for the wrongful death of a prize fighter, because there was no proof that the examining doctor was an employee of the state or that he was negligent in pronouncing the deceased to be in condition to fight.—*Rosensweig v. State of New York.* New York Supreme Court. March 28, 1958. 7 NEGLIGENCE CASES (2d) 1483.

FIRE

Summaries of Selected Decisions Recently Reported by CCH FIRE-CASUALTY INSURANCE REPORTS

Rain Damage Not Considered "Accident"

Merchandise which was damaged by rain entering by way of the roof of a building, on which reroofing had been suspended for the weekend, was not damage caused by an "accident" within the meaning of a contractors' liability policy. Florida.

The insurer brought a suit for declaratory judgment on the ground that it was not liable under the terms of the policy it issued to the insureds. The insureds were engaged in the general contracting business. They entered into a contract with a third party to reroof the latter's store building. Pursuant to the contract, the defendants commenced the reroofing job, but operations were suspended for the weekend. On Sunday it rained heavily, and water seeped through the top of the building into the storerooms on the ground floor, which were occupied by the insured's tenants. The water caused damage to their goods and merchandise. The tenants called upon the insured to reimburse them for the damage to their property. The insurer alleged that it was not liable to the insured under the terms of the policy, because liability for damage under the terms of the policy had to be caused by an accident and no accident had been alleged. The pertinent section of the policy stated that the insurer will pay "all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident." The trial court found that there was no genuine issue regarding the material facts, and entered a summary judgment for the insurer.

On appeal the judgment of the trial court was affirmed. The issue turned on the proper interpretation of the word "accident" as used in the insurance policy. The court stated that an effect which is the natural and probable consequence of an act or course of action is not an "accident" within the meaning of the policy. It reasoned that an unprecedented torrential downpour of rain, under certain conditions, could be considered an accident, but afternoon showers were not unusual or unexpected. When the contractor left the work unfinished without taking proper precautions to protect it against rain or showers, he should have anticipated that a shower was likely to occur in the "rainy season," which was a matter of common knowledge. The rain could not therefore be held to be an accident.—*Christ et al. v. Progressive Fire Insurance Company.* Florida District Court of Appeals for the Second District. March 19, 1958. 9 FIRE AND CASUALTY CASES 548.

Undisclosed Title Dispute Erases Insurer's Duty to Defend

Where the insured withheld information of a title dispute at the time he purchased a policy of title insurance, the insurer was not bound to defend a suit to quiet title brought against its insured. Washington.

The insured sued the insurer for the expenses he incurred by reason of the insurer's failure to defend a prior action against him. When the insured sold certain timber which he believed he owned, he was informed that a third party claimed title and ownership of the timber. On the following day, without disclosing this information, he purchased a policy of title insurance. Subsequently the third-party claimant sued the insured, seeking to quiet title. The insured asked the insurer to defend the action in accordance with the provisions of the title policy, but the insurer declined to defend him.

The insured successfully defended the suit and brought an action against the insurer for expenses of his defense. The insurer quoted the policy, which stated it did not insure against "rights or claims based upon facts of which no notices are of record but of which the insured has notice . . . ." The trial court sustained a demurrer to the insured's complaint and dismissed the action.

On appeal the trial court's order was affirmed. The court held that the case turned upon the meaning of the language "rights or claims based on facts." It said that the word "facts" was neither ambiguous nor qualified. The third party's assertion of title and ownership in the insured's timber was a fact within the clear meaning of the word. The insured had knowledge of this fact and had the duty to disclose it to the insurer's agent when he applied for the policy. If the insured had made this disclosure, the insurer would have been given the opportunity to make an investigation of

the asserted facts of title and ownership, and determine whether to assume the risk.

The court concluded that the insured's entire argument was predicated on the false premise that the word "facts," as used in the exclusionary clause of the title policy, was limited to facts which would support a valid title or right of ownership. Since no such restriction on the meaning of the word could be found in the policy, the result of the suit which the insured defended was of no consequence.—*Lesamiz et al. v. Lawyers Title Insurance Corporation.* Washington Supreme Court. March 6, 1958. 9 FIRE AND CASUALTY CASES 542.

Stock Coverage Clause Construed

Where the policy insured "the property of the Insured or for which the Insured is liable," the word "liable" meant "responsible," and the insurer was bound to reimburse the insured's customers for the loss of their property by fire at the insured's place of business. Mississippi.

The insured sued the insurer on a fire policy for damage and destruction of machines which belonged to the insured's customers. The insured was engaged in the business of selling and servicing office machines and was insured under a standard fire insurance policy issued by the defendant insurer. The policy insured the contents of his building and covered his furniture, fixtures, equipment and supplies. The policy also covered the insured's stock of merchandise and "the property of the Insured or for which the Insured is liable while contained in the described building . . . ." Subsequently, while the policy was in force, a fire occurred and damaged the insured's machines, as well as those of his customers. The insurer settled for the losses to the insured's machines, but denied liability for the damage and destruction of machines belonging to the insured's customers. The lower court held for the insurer.

On appeal the lower court's judgment was reversed. The court held that the sole question was whether the policy covered fire losses to machines owned by the insured's customers which were in the building for repair. It stated that there was no need to consider whether the insured was liable to his customers as a consequence of the fire. The insurer contended that the policy insured only against the insured's liability—that is, the insured's fixed legal liability in connection with a fire loss to the property of others. The court said that the insured, as a bailee of the machines owned by his customers, had an insurable interest in such machines. It noted that the insured was not liable for the fire losses in the absence of negligence proximately causing the loss.

Since the policy was prepared by the insurer, it must be construed most strongly against it. According to Webster's International Dictionary, "responsible" is synonymous for "liable," and "liable" is defined as "exposed to a certain contingency or casualty of an undesired character." The court stated that the policy was a standard fire policy and the entire language dealt with insurance on property rather than on liability. The phrase "property for which the insured is liable" served the purpose of eliminating coverage on property for which the insured had no responsibility. The court concluded that the liability of the insured mentioned in the policy should be considered as referring to the present and existing general liability of the insured as bailee of the property, and not to his legal liability as a consequence of a fire.—*Penn et al. v. Commercial Union Fire Insurance Company of New York.* Mississippi Supreme Court. March 24, 1958. 9 FIRE AND CASUALTY CASES 540.

WHAT THE LEGISLATORS ARE DOING

Continued from page 294

maintain a minimum surplus of a specified amount. In the event that the companies' surplus is less than the stated amount, their license will be suspended. Laws 1958, H. B. 166, approved April 2, 1958, effective from its passage.

A third new law permits duly licensed agents representing one or more fire, fire and marine, inland, casualty or surety insurance companies to place some kinds of direct insurance in insurers not licensed to do business in Mississippi. A premium tax on insurance business of this type will be assessed. Laws 1958, H. B. 109, approved April 2, 1958, effective after its passage.

Another approved Mississippi law provides that service of process may be made upon unauthorized foreign or alien insurers, by serving the Commissioner as agent for service of process. The unauthorized insurer must deposit cash and securities with the clerk of the court in which his action is pending, in an amount to be fixed by the court. Laws 1958, H. B. 110, approved

March 26, 1958, effective from and after its passage.

A fifth law raised the compensation of foreign insurance company examiners from $25 per day to $35 per day, in addition to the actual, reasonable expenses incurred by them. Laws 1958, H. B. 405, approved March 26, 1958, effective after its passage.

New York . . . The Superintendent of Insurance shall keep all deposits of securities belonging to depositing insurers, as required or authorized by the provisions of the New York insurance law, in custody for his account with a bank, a trust company or a national bank in the State of New York. Such securities may be registered in the name of the Superintendent as the trustee or, at the option of the depositing insurer, they may be in bearer form. The bank, trust company or national bank may be designated by the depositing insurer and approved by the Superintendent. Chapter 233, Laws 1958, S. B. 1056, approved March 18, 1958, effective immediately.

South Carolina . . . It is unlawful for any licensed stock salesman to sell any more policies for an insurance company within 30 days of the time that he last engaged in selling stock for that company. It is also unlawful for any licensed insurance agent to sell any stock in an insurance company within 30 days from the time he last sold insurance policies for the company. Act 915, Laws 1958, approved March 31, 1958, effective January 1, 1959.

Another law provides for a new capital and surplus requirement for stock and mutual insurance companies. Formerly, the surplus requirement was for not less than $200,000; but now an additional $100,000 of the surplus must be maintained at all times. Act 914, Laws 1958, approved March 31, 1958 and effective upon approval by the Governor.

Virginia . . . Agents will be appointed for serving process on unlicensed nonresident insurance brokers and agents. Chapter 180, Laws 1958, H. B. 448, approved March 4, 1958, effective 90 days after adjournment.

A second Virginia law creates a Bureau of Property Records and Insurance within the Division of the Budget. The Bureau of Property Records has been given certain duties in relation to property and its insurance, and several agencies of the state are now required to furnish the bureau with information and to recommend the limits of certain property insurance. They are also required to appropriate funds. Laws 1958, H. B. 169, approved March 29, 1958, effective 90 days after adjournment.

A third new law provides for the supervision, control and expenditure of the Virginia Uninsured Motorists Fund. Laws 1958, H. B. 548, approved March 29, 1958, effective on and after October, 1958.

Fire Insurance

Mississippi . . . A new law provides for the regulation and supervision of industrial fire insurance by the Insurance Commission. Among other things, the limit of risk of all industrial fire insurance policies issued shall not exceed $1,500 on any one risk of fire and allied lines. The method of premium payment will be on a weekly or monthly basis, but in no event will premiums be collected for more than 12 months in advance. No industrial fire insurance policy may be issued on a quarterly or semiannual basis. Laws 1958, H. B. 325, approved April 2, 1958, effective 60 days after approval.

Financial Responsibility Acts

Georgia . . . The amount of property damage liability insurance or bond required under various sections of the Georgia act, which provides for the giving of security by the owners and operators of motor vehicles, is raised from $1,000 to $5,000. Act 483, Laws 1958, S. B. 194, approved March 26, 1958 and effective immediately.

Insurance Litigation

Virginia . . . The jury in a wrongful death action may award damages up to, but not exceeding, $30,000. The amount of damages formerly recoverable was $25,000. Laws 1958, H. B. 301, approved March 29, 1958, effective 90 days after adjournment.

Life

Massachusetts . . . Group life insurance has been defined so as to include a guarantor or conditional guarantor of the obligation as beneficiary. Chapter 188, Laws 1958, H. B. 126, approved March 24, 1958 and effective 90 days after approval.

Taxation

Kentucky . . . Every fraternal benefit insurance society licensed as such is now declared to be a charitable institution whose funds are exempt from all state, county, district, municipal and school taxes, other than taxes on real estate and office equipment. Laws 1958, S. B. 194, approved March 31, 1958.

LIFE

Summaries of Selected Decisions Recently Reported by CCH LIFE INSURANCE REPORTS

National Service Life Insurance Beneficiaries

Where a woman unrelated by blood or marriage was designated as a parent and beneficiary under a contract of NSLI, recovery was allowed due to the relationship which had existed between the beneficiary and the decedent. Connecticut.

Plaintiff, an alleged beneficiary under a contract of National Service Life Insurance, sued the United States Government for the insurance proceeds. The decedent had taken out an NSLI policy, and after a month's time he changed the beneficiary from his sister to the plaintiff. He also designated the plaintiff as emergency addressee. Although the plaintiff was not a blood relation, she was named as a parent by the insured. The evidence showed that she had often counseled the decedent, had taken care of him on numerous occasions and had carried on an extensive correspondence with him while he was overseas in the service. Decedent had planned to reside with the plaintiff upon his return from the service. The government contended that although the soldier paid the premiums in reliance on the government's acceptance of the plaintiff as beneficiary, there was no way in which the government could have known the details of the relationship until the papers supporting the claim for the insurance proceeds were filed after the soldier's death.

The question presented was whether on the evidence, the plaintiff was a person qualifying as a parent within the meaning of the National Service Life Insurance Act. The court held for the plaintiff. It stated that the relationship, in view of the soldier's age, could not qualify the plaintiff as a parent under the strict common law definition, but the cases construing the term "parent" have not been in accord. The tendency has been to broaden the definition in order to carry out the soldier's wishes, particularly in view of his payment of premiums. The soldier considered the plaintiff a parent, his closest remaining connection, the one to be notified if anything happened to him and the one he wished to benefit by his insurance in case of his death. Her house was the nearest thing to a home that he could go to on release from the service, even though he had never lived in her home, was not related to her by blood or marriage, or had not supported her when working. The court stated that the relationship was to a large extent like that of a mother and an emancipated adult son. In a broad sense, she stood in the place of a parent to the decedent. Because of this close relationship, the court upheld the decedent's expressed desires.—*Bank v. U. S.* United States District Court for the District of Connecticut. March 11, 1958. 3 LIFE CASES (2d) 933.

Policies Construed—No Beneficiaries Named

The illegitimate daughter of the decedent, an insured, could not recover under his two policies. The word "children," as used in the policies, was construed to mean legitimate children only. Ohio.

The insurance company brought an interpleader action to determine who was entitled to the deceased's insurance proceeds. The decedent was insured under two group life insurance policies. He died without designating a beneficiary in either of the two policies. Each of the policies had a provision which stated that if no beneficiary was designated, payment would be made to the employee's widow or widower, and if neither survived, the proceeds were to go in equal shares to the employee's children. If no children survived the employee, the proceeds were to go to the employee's parents equally, or to the survivor; if neither survived, then the proceeds were to go in equal shares to the employee's brothers and sisters. The deceased left no widow surviving him and no children except the claimant, a minor illegitimate child; but he did leave his father, a brother and two sisters. His father and sisters assigned their interests to the deceased's brother, so that the contest over the proceeds of the insurance policies was between the illegitimate daughter's guardian and the deceased's brother. The lower court granted the brother's motion for a summary judgment on the ground that there was no genuine issue as to any material fact.

Upon appeal the supreme court sustained the motion. The sole question presented was whether the phrase in the policies, "to the employee's children who survive the

employee," included the illegitimate as well as the legitimate children. The court stated that at common law, the term "children" was construed to mean legitimate children only. It noted that there was no statute in Ohio governing the precise point. The court concluded that the existing statutes of Ohio do not alter the common law rule to the extent of permitting an illegitimate child, who has not been legitimatized in accordance with statute, to share in the proceeds of an insurance policy that designates as beneficiaries "employee's children who survive the employee."—*Aetna Life Insurance Company v. McMillan et al.* United States District Court for the Northern District of Ohio. March 13, 1958. 3 LIFE CASES (2d) 930.

Misrepresentation in Application

An applicant's negative answer concerning previous hospitalization, when he was aware that he had been hospitalized only six months prior to the date of application, was a misrepresentation which allowed the insurer to avoid the contract. South Carolina.

The plaintiff, beneficiary of a life policy, sued the insurer to recover actual and punitive damages for an alleged fraudulent breach of the insurance contract. The plaintiff's decedent was insured under a policy of life insurance issued by the defendant. The insured had been hospitalized and treated for a heart condition approximately six months before the date of the application. In the application, to the question "How many times have you been confined to the house or hospital by sickness, disabled by accident or received medical, surgical or clinical treatment within the past two years?" the insured answered, "None." The policy was issued without medical examination in reliance upon the information given in the application. Approximately four months after issuance of the policy, the insured died in a veterans' hospital from what was diagnosed as a cerebral hemorrhage due to hypertensive cardiovascular disease. The evidence indicated that upon receipt of the information that the insured was previously hospitalized, the manager of the district office instructed the agent to deny liability and refund the premiums. There was no evidence that the insurance company had any knowledge that the insured had heart trouble or was ever confined to a hospital when it issued this policy. The application would not have been accepted had the facts been disclosed. The jury verdict was in favor of the beneficiary, but the insurer was granted a judgment n.o.v. on the grounds of false representations in the application.

On appeal the lower court's judgment was affirmed. The court stated that the only reasonable inference warranted by the evidence was that the policy had been obtained by fraudulent misrepresentations. Assuming that the insured did not know that he had a serious heart condition, he did know that within the past two years he had received medical treatment at a veterans' hospital. The court held that to sustain a cause of action for fraudulent breach of contract, it is essential that there be a valid contract. Since the insurance policy upon which this action was based had been procured by fraud, the plaintiff could have no cause of action for its breach. The court concluded that the question of punitive damages would not arise until after the plaintiff had shown the right to actual damages for a breach of the policy.—*Gain v. United Insurance Company.* South Carolina Supreme Court. March 5, 1958. 3 LIFE CASES (2d) 929.

Short Shorts from the Courts

Second Circuit . . . A family poliomyelitis expense policy, issued August 1, 1953, provided indemnity for expenses incurred in treating poliomyelitis contracted by any member of the family within two years after the date of the policy. A rider to the policy covering certain diseases including encephalitis, which expressly stated that coverage was effective April 1, 1954, was construed to mean that the disease added by the rider must have been contracted on or after April, 1954, in order to permit reimbursement for expenses incurred in connection with that disease.—*Glickman v. Lumbermens Mutual Casualty Company of Illinois.* United States Court of Appeals for the Second Circuit. March 19, 1958. 3 LIFE CASES (2d) 941.

Tenth Circuit . . . The policies in issue provided for waiver of payments in the event the insured became totally disabled and remained so for six months. The court rendered judgment for the plaintiff insured, finding that the evidence was sufficient to raise a jury issue as to whether the insured could substantially perform all the acts of any gainful occupation within the range of his normal capabilities.—*Gardner v. New York Life Insurance Company.* United States Court of Appeals for the Tenth Circuit. March 4, 1958. 3 LIFE CASES (2d) 957.

AUTOMOBILE

Summaries of Selected Decisions Recently Reported by CCH AUTOMOBILE INSURANCE REPORTS

Garage Liability Policy Construed

Where the insured, a repair shop operator, improperly repaired two motor vehicles and was sued for damages, it was held that the repairs were not "accidents" within the meaning of his garage liability policy. Mississippi.

The insured, a repair shop operator, sued the insurer under a "Garage Liability Policy," seeking to recover the amounts he paid his attorney to defend two suits which were brought against him by one of his customers. The foundation of the customer's suits was the alleged imperfect mechanical work the insured performed upon two of the customer's motor vehicles. The insurer contended that the policy did not cover such a situation, and therefore it was not obligated to defend the suit. The lower court sustained the insurer's general demurrer. The insured appealed.

The supreme court affirmed the trial court, sustaining the insurer's demurrer. The insurer argued (1) that the policy involved was not a "Products Policy," under which the insurer guarantees the quality of the insured's work; and (2) that the liability, if any, of the insurer had to be grounded on an accident.

The court, in examining the nature of the policy, noted that the insuring agreement obligated the insurer to "pay on behalf of the insured" bodily injury liability, property damage liability, automobile medical payments and injury to or destruction of property of others. In addition to this, the undertaking of the insurer was to pay on behalf of the insured such sums as the insured would become legally obligated to pay "caused by accident." The policy nowhere bound the insurer to guarantee the type of work the insured did at his shop. A special premium is charged for the "Products Policy" and if the insured desired such coverage he could have obtained it by paying the extra premium.

The insured conceded that the liability of the insurer must rest in an accident, but he contended that his defective work was an "accident" under the terms of the policy. The court disposed of this contention by stating that the insured was guilty only of defective workmanship which resulted in money damage to his customer. It defined the word "accidental" as meaning undesigned, unintended, unexpected and unpremeditated. Here the court could find nothing unintended or undesigned involved in the insured's actions, because he intended to make the repairs upon the customer's vehicles in the manner in which they were done. The court stated that although the policy obligated the insurer to defend a suit which was groundless, false or fraudulent, the suit had to be grounded in some state of facts which could give rise to a cause of action under the policy. The court held that the insured's suit was not within the coverage afforded by the terms of the policy.—*Womack et al. d.b.a. Womack Brothers Diesel Service v. Employers Mutual Liability Insurance Company of Wisconsin.* Mississippi Supreme Court. March 17, 1958. 13 AUTOMOBILE CASES (2d) 1273.

Conditional Seller Can Maintain Action Against Tortfeasor

A conditional seller can sue a tortfeasor for damage to a conditionally sold car even though there was no default on the part of the buyer. The seller has an interest in the car which the court will protect. Massachusetts.

An action for damages was brought by a finance company (assignee of the conditional vendor) against a tortfeasor for damage to a conditionally sold car. The plaintiff (finance company) at the time of the accident held, by a written assignment from the conditional vendor, the note and conditional sale agreement given in connection with the sale of the automobile. The accident occurred when the automobile was driven by the conditional vendee, without any fault on his part. The automobile was damaged to the extent of $250. There had been no default on the conditional sale agreement by the conditional vendee at the date of trial. The judge found for the defendant and the plaintiff appealed.

The state supreme court reversed the appellate court's finding, pointing out that the lack of default on the part of the conditional vendee was without significance. Even though the conditional vendor or his assignee has no right to possession until default, he nevertheless has a security title to assure the payment of the debt.

The plaintiff contended that it did not appear whether the amount of the debt owed to the finance company was greater or less than the damage. The court disposed of this argument by stating that since the conditional vendor has rights similar to those of a mortgagee and is entitled to have his security unimpaired, he ought to recover for the harm done to that security irrespective of the amount of the debt—at least where, as here, there has been no contributory negligence on the part of the conditional vendee. Since the automobile was damaged to the extent of $250, to that extent the plaintiff's security was impaired. Under the principles discussed above, the plaintiff was entitled to recover that amount in this action. Of course, if the amount recovered should exceed the amount of the debt, the surplus would be held for the benefit of the conditional vendee.—*Bell Finance Company v. Gefter.* Massachusetts Supreme Judicial Court. February 21, 1958. 13 AUTOMOBILE CASES (2d) 824.

Minor Can Bring Tort Action Against Father's Estate

A father's estate could be sued by his minor son in tort because the doctrine of intrafamily tort immunity expired upon the father's death. Third Circuit.

Plaintiff, a minor son, on behalf of his mother as guardian, sued the administrator of his deceased father's estate for injuries sustained by him while a passenger in his deceased father's car. The car had collided with a truck, the accident resulting in the death of the father and serious injuries to the plaintiff. The administrator moved to dismiss the complaint as failing to state a cause of action because of the Pennsylvania intrafamily immunity doctrine. In addition he asserted the defense of improper venue. The district court entered a verdict for the plaintiffs in the sum of $87,037.70.

On appeal the judgment of the district court was affirmed. The question of venue was raised by the administrator. The court held that the appointment by the administrator of an agent to accept service of process within Pennsylvania constituted a waiver of the venue protection.

The principal question on this appeal was whether Pennsylvania's intrafamily tort immunity doctrine prevents an action by a child against the estate of his deceased father for the father's negligence. Since jurisdiction was based upon diversity of citizenship, *Erie Railroad v. Tompkins,* 304 U. S. 64 (1938) required the court to apply Pennsylvania case law. The court adopted the Pennsylvania district court's opinion which held that although there may be immunity from suit between parent and child during life, the immunity does not extend to the personal representative of the deceased parent or child.—*Davis v. Smith, Admr.* United States Court of Appeals for the Third Circuit. March 17, 1958. 13 AUTOMOBILE CASES (2d) 1150.

"Sole Owner" Clause of Theft Policy Analyzed

Where a dealer purchased a car not knowing that it was stolen, and it was subsequently stolen from him, the theft was not covered by the dealer's "sole owner" theft policy since title to the car had never vested in him. Mississippi.

The insured, an automobile dealer, sued the insurer under his theft policy to recover damages for an automobile which was stolen from him. The evidence showed that the automobile originally belonged to a third party. It had been stolen from the original owner and then sold to the insured, who did not know it had been stolen. He placed the car on display for sale, and subsequently the car was stolen from him. The lower court held for the insurer.

On appeal the supreme court affirmed the lower court's judgment. It said that the decisive question was whether or not the automobile which was stolen from the insured was covered by a theft policy which had been issued by the insurer. The policy only covered automobiles of which the insured was the "sole owner." The court quoted an earlier Mississippi case which held that "An insurance ownership is sole when no one else has any interest in the property as owner." The court restated the general rule that a person cannot transfer a better title to a chattel than he himself has, and said: ". . . one who has acquired possession of property by a crime such as theft cannot confer title by a sale even to a bona fide purchaser. . . . The same defect of title will continue to exist in all subsequent sales by persons deriving title from a thief as a source."—*Gurley, d.b.a. Gurley Motor Company v. Phoenix Insurance Company.* Mississippi Supreme Court. March 17, 1958. 13 AUTOMOBILE CASES (2d) 1259.

In Future Issues

"LIABILITY Claims and Litigation" is the subject of a forthcoming article. Spurgeon L. Smithson discusses such items as timing an investigation, taking statements, witness reports, photographs, stopping distances of cars, summary of investigation, and valuations of claim or lawsuit. Many forms and check lists accompany this article. Claim adjusters and attorneys will be especially pleased with the practical suggestions that the author has to offer.

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THE TOPIC "Liability Beyond Insurance Policy Limits" is carefully treated by Duane R. Ertsgaard. This well-documented article gives special attention to the question of whether a liability insurer is liable for punitive damages which are assessed against the insured for activities within the policy coverage.

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AN ARTICLE discusses the relative tax advantages and disadvantages of valued and nonvalued forms of use and occupancy insurance. Robert L. Merritt points out that while one method may result in ordinary income, the other may have different consequences.

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